Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

UGI UTILITIES, INC.,
Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON *
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Last Term, in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, the Court held that private parties may sue other potentially liable parties for contribution under § 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9613(f)(1), only during or following a CERCLA abatement or cost recovery action. 543 U.S. 157, 166 (2004).

Cooper Industries acknowledged but left undecided the important question presented here:

> Whether persons potentially liable for cleanup costs, who have neither been sued under CERCLA nor resolved their liability to the government, but who have incurred cleanup costs, can recover those costs from other potentially liable parties under § 107(a)(4)(B), thereby avoiding § 113(f)'s limitations on contribution claims.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioner, defendant-appellee below, is UGI Utilities, Inc. (Petitioner or UGI). UGI is wholly owned by UGI Corporation, a publicly held corporation.

Respondent, plaintiff-appellant below, is Consolidated Edison Company of New York, Inc. (Con Ed).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, UGI Utilities, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) addressing the issue raised in this petition is reported at 423 F.3d 90. The court of appeals' summary order addressing other issues (Pet. App. 24a-29a) is unreported. One opinion of the district court (Pet. App. 30a-57a) is reported at 310 F. Supp. 2d 592. The other (Pet. App. 58a-100a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2005. The order denying UGI's timely petition

for rehearing was entered on January 18, 2006. Pet. App. 102a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) makes four categories of persons, commonly referred to as "potentially responsible parties" or "PRPs," liable for the costs of cleaning up hazardous waste sites. 42 U.S.C. § 9607(a)(1)-(4). These PRPs include owners and operators of facilities at which hazardous waste is located and past owners and operators of those facilities. *Id.* Section 107(a) makes them liable for, among other things, "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe" and liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." *Id.* at § 9607(a)(4)(A)-(B). Section 107(a) has been uniformly interpreted to make each PRP strictly liable, jointly and severally, for these costs.[1]

As originally enacted, CERCLA did not provide an express mechanism for a PRP to seek contribution from other PRPs. *See Key Tronic Corp.* v. *United States*, 511 U.S. 809, 816 (1994). Some courts bridged this statutory gap by holding that § 107 implied that a PRP could sue for contribution,[2] or

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[1] *See, e.g., Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423 (2d Cir. 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 774, 776 (4th Cir. 1998).

[2] *See, e.g., United States* v. *Ward*, No. 83-63-CIV-5, 1984 WL 15710, at *4 (E.D.N.C. May 14, 1984) (scope of liability, including liability in contribution, is to be determined under §107(a)); *Pinole Point Props., Inc.* v. *Bethlehem Steel Corp.*, 596 F. Supp. 283, 291 (N.D. Cal. 1984) (potentially liable party has standing to sue other PRPs under § 107(a)(4)(B)); *City of Philadelphia* v. *Stepan Chem. Co.*, 544 F. Supp.

that federal common law afforded PRPs a contribution claim.[3] Other courts concluded that § 107(a) afforded no right of contribution and provided a private cost recovery claim only to plaintiffs who were themselves not liable for the cleanup.[4]

In § 113(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress provided private parties with "two express avenues for contribution," *Cooper Indus.*, 543 U.S. at 167. First, § 113(f)(1) provides, "Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], during or following any civil action [brought under § 106 or § 107]." 42 U.S.C. § 9613(f)(1). Second, § 113(f)(3)(B) authorizes parties that settle their liability with the United States or a state to bring contribution claims against non-settling PRPs: "A person who has resolved its liability to the United States or a State for some or all of a response action . . . in an administrative or judicially approved settlement may seek

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1135, 1143 (E.D. Pa. 1982) (§107(a) "gives a private [responsible] party the right to recover its response costs from responsible third parties which it may choose to pursue").

[3] *See, e.g., United States* v. *New Castle County*, 642 F. Supp. 1258, 1265 (D. Del. 1986) (holding "Congress empowered the federal courts to establish a federal common law of contribution under CERCLA," and also holding no right of contribution under §107(a)(4)(B) or § 107(e)); *Colorado* v. *ASARCO, Inc.*, 608 F. Supp. 1484, 1490-92 (D. Colo. 1985) (recognizing right of contribution in §107 action under federal common law, which is preserved in §107(e)); *United States* v. *A&F Materials Co.*, 578 F. Supp. 1249, 1255 (S.D. Ill. 1984) ("Congress intended the courts to impose common law liability rules [including contribution] on generators and other entities liable under CERCLA.").

[4] *See Mardan Corp.* v. *C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1058 (D. Ariz. 1984) (equitable doctrine of unclean hands bars liable party from recovery of response costs from other PRPs under § 107(a)(4)(B)); *D'Imperio* v. *United States*, 575 F. Supp. 248, 253 (D.N.J. 1983) ("In order to seek recovery under this section, it is necessary for the plaintiff to prove that he himself is not liable for these costs.").

contribution from any person who is not party to [such] a settlement." 42 U.S.C. § 9613(f)(3)(B). PRPs that have not been sued and have not settled with the government cannot maintain a § 113 contribution claim. *See Cooper Indus.*, 543 U.S. at 166.

After SARA, the Court's *dicta* have twice touched on whether an implied § 107(a) contribution claim exists after Congress added § 113(f). *Key Tronic* observed that § 107(a) may by implication create a private cause of action for some persons. 511 U.S. at 818 n.11. But last Term the Court cautioned in *Cooper Industries* that lower courts' conclusion that a contribution right "arose either impliedly from provisions of the statute, or as a matter of federal common law . . . was debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statutes." 543 U.S. at 162. Neither *Key Tronic* nor *Cooper Industries*, however, resolved the extent, if any, to which § 107(a) creates a private contribution remedy distinct from, and potentially inconsistent with, the remedy Congress afforded in § 113(f).

Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 & 9613, are set out in the petition appendix (Pet. App. 103a-142a).

STATEMENT

This case presents the important issue of CERCLA construction that *Cooper Industries* expressly declined to decide: whether nine courts of appeals have correctly held that a PRP may not pursue a CERCLA § 107(a) action against other PRPs, including as an alternative to a § 113(f) contribution claim that is otherwise barred. *See* 543 U.S. at 169. Although the Second Circuit previously had held that § 113(f) "plainly governs . . . contribution actions," *Bedford Affiliates*, 156 F.3d at 424, and that a PRP "could not pursue a § 107(a) cost recovery claim against [other PRPs]," *id.* at 423-24, in this case it answered the question *Cooper Industries* left open

by abandoning its prior holding and giving PRPs a § 107(a) right to recover their cleanup costs from other PRPs.

The court of appeals reasoned that after *Cooper Industries* it "no longer makes sense" to view § 113(f)(1) as the sole means by which PRPs can seek to recover from other PRPs. Pet. App. 14a. By interpreting CERCLA to provide a § 107(a) claim to PRPs that do not meet § 113(f)'s conditions on contribution claims, the court created a conflict both with its sister circuits and with the United States's consistent interpretation of CERCLA.

1. Con Ed, which owned or operated manufactured gas plants, is potentially liable for their remediation. Con Ed owned or operated manufactured gas plants (MGPs) at sites in the State of New York. New York "directed Con Edison to investigate and, if necessary, remediate contamination at the MGP Sites." C.A. J.A. 11 (First Am. Compl.). But Con Ed, like Aviall, was never sued under CERCLA. Pet. App. 7a.

In 2002, Con Ed entered into an agreement with New York to clean up several of these sites. C.A. J.A. 870-907. That agreement, however, did not resolve Con Ed's CERCLA liability to the State. Pet. App. 10a.

Before agreeing with New York that it would clean up the MGP sites, Con Ed sued UGI for contribution under federal and state law, invoking the district court's jurisdiction under both 28 U.S.C. § 1331 and § 1332. Con Ed alleged that UGI and its related companies were past owners and operators of the plants. C.A. J.A. 8-18 (First Am. Compl.). Con Ed's only federal law claim invoked § 113(f)(1) and requested "judgment in favor of Con Edison and against UGI *for contribution* in an allocation to be determined at trial."[5] *Id.* at 16 (emphasis added).

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[5] Although Con Ed asserted state law claims, Con Ed abandoned them on appeal. Con Ed's action against UGI now depends exclusively on the existence of the Second Circuit's newly-created § 107(a) PRP claim.

The district court granted UGI summary judgment. Pet. App. 101a. As to some sites, it held that UGI was not "a person who is liable or potentially liable under section [107(a)]," as required by § 113(f), because the evidence did not support a finding that UGI owned or operated those sites. *Id.* at 49a-57a, 93a-95a. As to other MGP sites, the court held that Con Ed had released any CERCLA operator liability claim. *Id.* at 94a-95a. Con Ed appealed.

2. The court of appeals held that Con Ed's § 113(f) claim was barred by *Cooper Industries* but allowed Con Ed to proceed under § 107(a). While Con Ed's appeal was pending, the Court decided *Cooper Industries*. After ordering supplemental briefing on whether *Cooper Industries* deprived it of subject matter jurisdiction, the court of appeals correctly concluded that Con Ed's ability to maintain an action under § 113(f) was foreclosed by *Cooper Industries*' holding that § 113(f)(1) is unavailable to parties that have not been sued under CERCLA. Pet. App. 7a.

Con Ed acknowledged that *Cooper Industries* barred its § 113(f)(1) claim (C.A. Supp. Reply Br. for Pl.-Appellant at 1 n.1), arguing instead that its agreement with New York to clean up the MGP sites entitled it to sue UGI for contribution under § 113(f)(3)(B) (Pet. App. 3a, 7a). The court of appeals rejected this argument, reasoning that the agreement did not resolve Con Ed's CERCLA liability to the state, a prerequisite to a § 113(f)(3)(B) contribution claim. Pet. App. 10a.

The court of appeals held, however, that "in light of *Cooper Industries*, section 107(a) applies to the facts of this case." *Id.* at 11a. In particular, the court of appeals thought footnote 3 of *Cooper Industries* required it to reexamine the well-established principle that "actions by parties who might themselves be liable under section 107(a) were necessarily actions for contribution, and [were] therefore governed by the mechanisms set forth in § 113(f)." *Id.* at 14a (quotation omitted). It reasoned that the Court in *Cooper Industries*

"expressly stated that the section 107(a) cost recovery remedy and the section 113(f)(1) contribution remedy, though 'similar at a general level in that they both allow private parties to recoup costs from other private parties,' are 'clearly distinct.'" *Id.* (quoting *Cooper Indus.*, 543 U.S. at 163 n.3).

This observation, the court of appeals concluded, in combination with *Cooper Industries*' holding "that a section 113(f)(1) action is only available during or following a specified civil action . . . impel[led it] to conclude that it no longer makes sense to view section 113(f)(1) as the means by which the section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under section 107(a)." *Id.* According to the court of appeals, once *Cooper Industries* held that § 113(f)(1) is unavailable to PRPs who have not been sued and recognized that § 107(a)'s remedy is "distinct" from § 113(f)(1)'s contribution remedy, "determining whether a party in Con Ed's circumstances may sue under section 107(a) is easily resolved based on that section's plain language." *Id.* Turning to the "plain language," the court of appeals held that Con Ed is a "person" that incurred "costs of response"; therefore, § 107(a) authorizes Con Ed's suit against UGI to recover those costs. *Id.* at 15a.

In so holding, the court of appeals rejected other courts of appeals' conclusion that CERCLA does not allow private PRPs to use § 107(a) to recover costs from other PRPs. *Id.* at 15a-16a. The court of appeals attempted to distinguish these precedents by limiting its new § 107(a) remedy to PRPs that incurred cleanup costs "voluntarily." *Id.* at 16a-17a. But the court recognized that, even as so limited, its holding squarely conflicts with the Ninth Circuit's holding in *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), that even voluntary PRPs are limited to contribution claims under § 113(f). The Second Circuit declared, "We simply and respectfully disagree with the Ninth Circuit's holding in *Pinal Creek*" (Pet. App. 21a), concluding that

Cooper Industries' statement that § 107(a) and § 113(f) remedies are "clearly distinct," 543 U.S. at 163 n.3, eviscerates *Pinal Creek*'s holding (Pet. App. 21a).

After holding that § 107(a) provided a basis for Con Ed's action against UGI, the court of appeals in a separate order reversed in part the district court's decision granting UGI summary judgment on the basis of a release executed by Con Ed's predecessor-in-interest and remanded for further proceedings on the merits of that claim under § 107(a). *Id.* at 29a.

The court of appeals denied UGI's petition for rehearing and rehearing en banc without comment. *Id.* at 102a.

REASONS FOR GRANTING THE PETITION

Before the decision below, ten courts of appeals (including the Second Circuit) had held that § 113(f) provides the sole federal law mechanism by which private parties can recover an equitable portion of their incurred cleanup costs from other PRPs. Creating conflict where none previously existed, the court of appeals held that PRPs to which Congress refused a contribution claim under § 113(f) may recover "necessary response costs incurred voluntarily" from other PRPs under § 107(a). Pet. App. 17a.

This conclusion, in addition to creating a conflict with decisions in every other circuit to address the issue, is wrong on an important question of federal law because it is inconsistent with the text, structure, and history of CERCLA. First, § 107(a)'s text does not authorize PRP suits and does not mention contribution; it instead authorizes full recovery from private parties, jointly and severally. *See* 42 U.S.C. § 9607(a)(4)(B). Section 113(f)(1)'s text, on the other hand, expressly authorizes PRPs to bring claims for "contribution" against other PRPs and authorizes courts to resolve such claims by allocating liability according to "equitable factors." *See* 42 U.S.C. § 9613(f)(1). Second, Congress's 1986 amend-

ments expressly provided a limited contribution remedy in § 113(f) that is structured to promote private party settlements with the government and that is inconsistent with a private PRP § 107(a) claim. Third, the legislative history reveals that § 113(f) was intended to supersede earlier district court holdings that § 107(a) implied a contribution claim and to provide the exclusive CERCLA contribution remedy.

The United States has recently renounced the Second Circuit's decision in this case, informing the Eighth Circuit that the court of appeals' decision in this case "is contrary to controlling authority in [the Eighth] Circuit and is unpersuasive." Brief of the Appellee at 46, *Atlantic Research Corp.* v. *United States*, No. 05-3152 (8th Cir. Dec. 6, 2005) [hereinafter U.S. *Atl. Research* Br.].[6] The United States has repeatedly disagreed with the CERCLA construction adopted by the court of appeals below. In its *amicus* brief in *Cooper Industries*, the United States championed *Pinal Creek*'s conflicting holding that even "voluntary" PRPs are limited to contribution claims under § 113(f). Brief for the United States as Amicus Curiae Supporting Petitioner, *Cooper Indus.*, 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 354181, at *20 n.9 [hereinafter U.S. *Cooper Indus.* Br.]; *see also* Brief for the Federal Appellees, *E.I. DuPont de Nemours & Co.* v. *United States*, No. 04-2096 (3d Cir. April 22, 2005) [hereinafter U.S. *DuPont* Br.].[7] *Cooper Industries*, moreover, did not change the United States's view. The Government continues to maintain that any attempt "to allow certain PRPs full recovery under section 107(a)(4)(B) is inconsistent with

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[6] Excerpts from the United States's *Atlantic Research* brief are included in the Appendix to Petition. Pet. App. 163a-170a. The complete brief is available at http://www.ca8.uscourts.gov/briefs/05/12/appellee/053152_1br.pdf?A1=View+Brief.

[7] On file with, and available from, the United States Court of Appeals for the Third Circuit.

CERCLA's settlement scheme and should be rejected." Pet. App. 170a (U.S. *Atl. Research* Br. at 50).

What is more, the court of appeals' decision embodies a fundamental misreading of *Cooper Industries*, which did *not* "impel" the lower courts to fashion a § 107(a) remedy for PRPs that is unfettered by § 113's constraints. By misreading *Cooper Industries* in a way that advances a particular public policy viewpoint, the court of appeals risks disrupting the settled CERCLA construction in every other circuit. The effects have already been seen, as some district courts have similarly read *Cooper Industries* to create § 107(a) PRP claims, even in circuits that previously held that PRPs must seek contribution under § 113(f). A ruling by the Court is now needed to avoid substantial uncertainty and costly litigation across the Nation over PRPs' ability to recovery cleanup costs under § 107(a).

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH NINE OTHER COURTS OF APPEALS' HOLDINGS THAT ARE WELL FOUNDED IN CERCLA'S TEXT, STRUCTURE, AND HISTORY

A. The Second Circuit's Decision Conflicts With Uniform Holdings That PRPs Cannot Sue Under § 107(a)

Before the decision in this case, the courts of appeals had uniformly held that § 107(a) does not afford PRPs a right of recovery against other PRPs. Indeed, though not reaching the issue, *Cooper Industries* identified decisions from eight circuits (including the Second Circuit) that the parties had accurately cited as holding "that a private party that is itself a PRP may not pursue a § 107(a) action against other PRPs for joint and several liability." *See Cooper Indus.*, 543 U.S. at 169 (citing *Bedford Affiliates*, 156 F.3d at 423-24; *Centerior Serv.*, 153 F.3d at 349-56; *Pneumo Abex*, 142 F.3d at 776;

Pinal Creek, 118 F.3d at 1301-06; *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1120-24 (3d Cir. 1997); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 & n.7 (11th Cir. 1996); *United States* v. *Colo. & E.R. Co.*, 50 F.3d 1530, 1534-36 (10th Cir. 1995); *United Technologies Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 98-103 (1st Cir. 1994)). In addition, the Seventh and Eighth Circuits similarly so held in *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994), and *Dico, Inc.* v. *Amoco Oil Co.*, 340 F.3d 525, 531 (8th Cir. 2003), respectively. Thus, when the Court decided *Cooper Industries*, ten courts of appeals had ruled, contrary to the Second Circuit's novel ruling in this case, that PRPs may not maintain a contribution claim independent of § 113(f). "Every court of appeals that has examined this issue," the Third Circuit explained before the decision in this case, "has come to the same conclusion: a section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken clean-ups. An action brought by a potentially responsible person is by necessity a section 113 action for contribution." *New Castle*, 111 F.3d at 1120 (emphasis in original).

As noted, before this case the Second Circuit followed the same rule. Its *Bedford Affiliates* decision rejected the contention that a PRP was entitled to recover under § 107(a). 156 F.3d at 424. Consistent with its sister circuits, *Bedford Affiliates* held that "one potentially responsible person can never recover 100 percent of the response costs from others similarly situated since it is a joint tortfeasor—and not an innocent party—that ultimately must bear its *pro rata* share of cleanup costs under § 107(a)." *Id.* Following earlier decisions of the First and Seventh Circuits, *Bedford Affiliates* concluded that an "action to recoup the portion of costs exceeding a potentially responsible person's equitable share of the overall liability . . . is a quintessential claim for contribution . . . [and] CERCLA § 113(f) plainly governs

such contribution actions." *Id.* (citing, *inter alia, United Techs.*, 33 F.3d at 100, and *Akzo*, 30 F.3d at 764).

B. The Court of Appeals' New Construction Runs Counter to CERCLA's Text, Structure, and History

1. CERCLA's text does not support affording PRPs a § 107(a)(4)(B) contribution claim. In refusing to adhere to the previously uniform holdings that § 107(a)'s cost recovery claim is available only to "innocent" parties (Pet. App. 15a (refusing to follow *United Techs.*, 33 F.3d at 100)), the court of appeals reasoned that the "plain language" of § 107(a) requires a contrary result.

But the court of appeals failed to consider § 107(a)'s text accurately or fully, stating, "Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response." Pet. App. 15a (emphasis in original). The § 107(a)(4)(B) touchstone, however, is "any *other* person." Section 107(a) provides that the PRPs described in subsections 107(a)(1)-(4) "shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe . . . ; [and] (B) any other necessary costs of response incurred by any *other* person . . . ," 42 U.S.C. § 9607(a)(4)(A)-(B) (emphasis added). Reading "any other person" to exclude PRPs reconciles § 107's text with Congress's express contribution remedy in § 113(f) and with the overwhelming majority view that PRPs cannot sue under § 107(a)(4)(B). The Second Circuit simply ignored the "other person" language.

As courts of appeals had previously concluded, nothing in § 107(a)(4)(B)'s text provides an express *contribution* claim, i.e., a claim arising "when two or more persons become liable in tort to the same person for the same harm . . . even though judgment has not been recovered against all or any of them."

RESTATEMENT (SECOND) OF TORTS § 886A(1) (1979), *cited in Centerior Serv.*, 153 F.3d at 350.

Nor can a contribution claim fairly be implied from § 107(a)(4)(B), which provides that PRPs shall be liable for "other costs of response incurred by any other person." Section 107(a)'s cost recovery language has long been interpreted to make PRPs strictly liable for all cleanup costs (subject only to the limited defenses in § 107(b)). As several courts of appeals have explained, because § 107(a) typically renders defendant-PRPs jointly and severally liable for the plaintiff's entire cleanup cost, a plaintiff under that section must be a party entitled to recover all of its costs.[8] As the First Circuit explained in an often-cited decision, actions under § 107(a) are, as Congress describes them in § 113(g)(2), "actions for 'recovery of the costs' . . . suggest[ing] full recovery; and it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures." *United Techs.*, 33 F.3d at 100. Because a PRP is potentially liable for its share of those expenditures, allowing a PRP to hold other PRPs strictly liable for all of them is nonsensical. For this reason too, § 107(a)(4)(B)'s "other persons" language is better read to refer to persons *other* than PRPs.

What is more, § 113's text expressly provides for contribution claims by PRPs. Section 113(f)(1) states that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section [107(a)]." 42 U.S.C. § 9613(f)(1). As courts of appeals have explained repeatedly, "a claim by a potentially responsible person is 'a

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[8] *See, e.g., New Castle*, 111 F.3d at 1120 (holding that only innocent parties can recover under § 107(a)); *United Techs.*, 33 F.3d at 100 (same); *Akzo*, 30 F.3d at 764 (a party that is itself liable "has experienced no injury of the kind that would typically give rise to a direct claim under section 107(a)").

quintessential claim for contribution.'" *New Castle*, 111 F.3d at 1122 (quoting *Akzo*, 30 F.3d at 764). This too weighs against finding additional contribution rights in § 107.

And, unlike § 107(a), § 113(f) authorizes courts to allocate cleanup responsibility among PRPs: "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). *See also Redwing Carriers*, 94 F.3d at 1513 (§ 113(f)'s contribution claim "is a means of equitably allocating response costs among responsible or potentially responsible parties"). Congress further provided in § 113(f) that "[s]uch [contribution] claims"—presumably all federal claims to allocate CERCLA liability—"*shall be brought in accordance with this section*." 42 U.S.C. § 9613(f)(1) (emphasis added).[9]

2. Construing § 107(a)'s cost recovery provision to provide a mechanism for allocating liability among PRPs is inconsistent with CERCLA's post-SARA structure. When Congress amended CERCLA to provide PRPs con-

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[9] *See also Dico*, 340 F.3d at 531 ("PRPs are limited to actions for contribution"); *Bedford Affiliates*, 156 F.3d at 424 ("CERCLA § 113(f) plainly governs such contribution actions."); *Centerior Serv.*, 153 F.3d at 350 ("Claims by PRPs, however, seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in § 113(f)."); *Pneumo Abex*, 142 F.3d at 776 ("potentially responsible parties . . . must seek contribution under section 9613"); *Pinal Creek*, 118 F.3d at 1300 ("Section 113(f) was thus enacted, explicitly recognizing and regulating contribution claims under CERCLA."); *New Castle*, 111 F.3d at 1122 ("The history and language of section 113 lend support to our conclusion that it, and not section 107, is the appropriate mechanism for obtaining a fair allocation of responsibility between two or more potentially responsible persons."); *Colo. & E.R.R.*, 50 F.3d at 1536 (as a matter of law, a CERCLA claim for contribution "is controlled by § 113(f)"); *United Techs.*, 33 F.3d at 103 (action for contribution falls under § 113); *Akzo*, 30 F.3d at 764 (claim by one liable party against others "is governed by section 113(f)").

tribution rights, it placed express limitations on their availability. These limitations provide incentives for private parties to conduct cleanups that are initiated or monitored by a government environmental enforcement agency. By allowing PRPs to recover costs under § 107, the court of appeals permits them to circumvent Congress's contribution limitations and thereby undermines incentives to cooperate fully with the government.

Congress's principal limitation on contribution claims is that they must be made either (i) during or following a civil action under § 107 or § 106 (42 U.S.C. § 9613(f)(1); *see also Cooper Indus.*, 543 U.S. at 160), or (ii) after a person has resolved its liability to the federal government or to a state government (42 U.S.C. § 9613(f)(3)(B)). Because government entities are the most common § 107(a) plaintiffs, both conditions promote government involvement in the cleanup.

To encourage PRPs to resolve their liability with the government, Congress, in SARA § 113(f)(2), provided settling PRPs with immunity from contribution claims, including "orphan share" liability, i.e., liability attributable to defunct or unidentifiable parties. 42 U.S.C. § 9613(f)(2). But SARA's immunity applies only to "contribution" claims. *See* 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), (h)(4). Congress did not address the § 107(a) cost recovery claim the Second Circuit has now given PRPs, suggesting it did not recognize the claim. As a result of the immunity's limitation, a PRP is presumptively free in the Second Circuit to sue settling PRPs—rather than just non-settlers—thereby substantially undermining Congress's effort to persuade PRPs to settle.

These disincentives are compounded by the fact that a § 107(a) claim offers a greater potential recovery than a § 113(f) contribution claim. *See New Castle*, 111 F.3d at 1123. Whereas § 107(a) provides a claim for all incurred response costs, § 113(f)'s text requires courts to allocate response costs among liable parties using "equitable factors,"

42 U.S.C. § 9613(f)(1). A successful § 107(a) plaintiff shifts the entire cleanup burden jointly and severally to each defendant, rather than, as under § 113(f), achieving an equitable allocation that also includes the plaintiff's share of the liability.

These disincentives are not ameliorated by allowing a PRP to sue under § 107(a) and then allowing the PRP-defendants to counterclaim for contribution (as the court of appeals suggests (Pet. App. 15a n.9)). If the PRP-plaintiff has first resolved its liability to the government, § 113(f)(2) may preclude such claims. And, even if contribution counterclaims are available, a PRP suing under § 107(a) might end up recovering substantially more than its equitable share, because it may be able to shift the burden of proof as well as the liability for orphan shares.

Congress's intent to make § 113(f) the exclusive contribution remedy is also evidenced by the different limitations periods for § 113(f) and § 107(a) claims. The three-year limitations period for § 113(f) contribution claims commences upon either entry of judgment against a PRP or the date on which a PRP resolves its liability with the federal or state government. 42 U.S.C. § 9613(g)(3). In contrast, the time for a § 107(a) cost recovery action generally expires either three years after the completion of removal or six years after initiation of remediation. 42 U.S.C. § 9613(g)(2).

As one court of appeals has explained, allowing PRPs to use § 107 would "enable section 107 to swallow section 113." *New Castle*, 111 F.3d at 1123. Potentially responsible persons would quickly abandon § 113 in favor of the "substantially more generous provisions of section 107." *Id.* *See also United Techs.*, 33 F.3d at 101 (allowing PRPs to use § 107(a) would be to "follow a course that ineluctably produces judicial nullification of an entire SARA subsection").

3. CERCLA's legislative history does not support allowing PRPs a § 107(a) contribution claim that is not subject to § 113(f)'s limitations. To the extent they are informative, Congressional committee statements confirm that § 113(f) was intended to govern all claims among PRPs involving allocation of cleanup costs. The House Committee on Energy and Commerce, for example, stated that § 113's contribution remedy "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, *when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.*" H.R. REP. No. 99-253(I), at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (emphasis added). The Senate Committee on Environment and Public Works similarly explained that § 113's goal was to authorize contribution claims by any person who believed that it had "assumed a share of the *cleanup or cost* that may be greater than its equitable share." S. REP. No. 99-11, at 44 (1985), *reprinted in* 2 LEGISLATIVE HISTORY OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, at 636 (1990) (emphasis added).

Courts of appeals that have considered this history have concluded that in enacting § 113, Congress "sought to codify the case law," *United Techs.*, 33 F.3d at 100, and "replaced the judicially created right to contribution under § 107(a)(4)(B)," *In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997). These courts have concluded from the Congressional record that § 113(f) became "the *sole* means for seeking contribution." *Id.* at 1120 (emphasis added). *See also New Castle*, 111 F.3d at 1120-22; *accord Pinal Creek*, 118 F.3d at 1301 (relying on legislative history in support of conclusion that § 113 qualifies any implied contribution right in pre-SARA CERCLA).

C. The Court of Appeals Rejected the Established CERCLA Construction to Provide a Remedy Congress Withheld

1. The court of appeals broke a ten-circuit consensus on CERCLA's post-SARA construction in order to create an expansive private cause of action and promote "voluntary" remediation. The court of appeals' creation of a § 107(a) PRP action reveals a fundamental disagreement with Congress's policy choice to limit the availability of contribution, as provided in § 113(f). The court of appeals presumed that § 113(f)'s requirement that a contribution claim be commenced "during or following any civil action," 42 U.S.C. § 9613(f)(1), leaves PRPs that clean up voluntarily with no remedy if they cannot assert a § 107(a) claim. Pet. App. 16a. This result, wrote the court of appeals, "would undercut one of CERCLA's main goals, encourag[ing] private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Id.* (quotation omitted).

In adopting this approach, which it characterized as "consistent with the view that courts took of section 107(a) before section 113(f) was enacted," *id.*, the court of appeals made no attempt to reconcile its rule with Congress's 1986 CERCLA amendments, including § 113(f)'s text or structure. In particular, it ignored completely § 113(f)(3)(B), which affords any PRP that resolves its liability to the government the right to seek contribution from non-settling PRPs. 42 U.S.C. § 9613(f)(3)(B). And it did not reflect on whether § 113(f)(1)'s "savings clause" allows PRPs to seek contribution under state law if they incurred disproportionate cleanup costs.

2. The court of appeals' suggestion that its new § 107(a) remedy is reserved for "voluntary" PRPs is untenable and costly to administer. The court of appeals attempted to distinguish prior decisions by limiting its new § 107(a) claim to voluntary PRPs. But its voluntary-versus-involuntary

distinction played no role in those earlier decisions. Each of them held broadly that any PRP claim against another PRP is one to allocate responsibility and necessarily sounds in contribution under § 113(f). *See* cases cited at n.9, *supra*.

Nor does CERCLA's text support the court's holding that voluntary PRPs can sue other PRPs under § 107(a)(4)(B), but involuntary PRPs cannot. The court of appeals attempted to locate its voluntary limitation in § 107(a)(4)(B) by contending that only costs incurred voluntarily are "necessary costs of response" recoverable under that subsection. Pet. App. 18a. The court did not explain, however, why "voluntarily" incurred costs should be recoverable as "necessary" costs of response, but, for example, costs incurred under compulsion of a government consent decree cannot be so recovered. Ordinary uses of "necessary" suggest the contrary conclusion: compulsory costs are necessarily incurred.[10]

The court of appeals' interpretation of "necessary" also conflicts with *Key Tronic*'s conclusion that "necessary" costs are those that "increase[ ] the probability that a cleanup will be effective and get paid for."[11] 511 U.S. at 820. Key Tronic, which had entered into a consent decree, could not have incurred "necessary costs of response" under the court of appeals' interpretation of "necessary" to mean "uncoerced." The Second Circuit's equating "necessary costs" with those voluntarily incurred also conflicts with the Ninth Circuit's holding that cleanup required by a state

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[10] *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 776 (10th ed. 1996) ("1 d: COMPULSORY 2: absolutely needed : REQUIRED").

[11] Courts of appeals have similarly defined "necessary costs of response" as those "necessary to the containment and cleanup of hazardous releases." *United States* v. *Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992). To be "necessary," a cost must simply be "closely tied to an actual cleanup" of hazardous releases. *See, e.g., Ellis* v. *Gallatin Steel Co.*, 390 F.3d 461, 482 (6th Cir. 2004).

agency results in "necessary costs of response." *See NL Indus., Inc.* v. *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).[12]

Additionally, the Second Circuit's subsequent application of its new § 107(a) rule demonstrates that it entails a case-by-case factual inquiry: "*Consol. Edison Co. v. UGI Utils., Inc.* . . . makes relevant . . . whether and to what extent plaintiffs incurred response costs voluntarily . . . [which] is of course a question of fact." *AMW Materials Testing, Inc.* v. *Town of Babylon*, No. 05-206-CV, 2006 WL 851772, at *1 (2d Cir. Mar. 28, 2006) (unpublished summary order). The Second Circuit's holding here thus not only disregards a uniform refusal to permit § 107(a) PRP claims, it replaces that rule with one allowing such claims based on the unique facts of particular cases—a substitution that is sure to impose substantial administrative and litigation costs.

D. The Court of Appeals Acknowledged That Its Decision Directly Conflicts With the Ninth Circuit's *Pinal Creek* Decision

Even the court of appeals' voluntary PRP limitation does not avoid conflict with the Ninth Circuit's decision in *Pinal Creek*. There, the Ninth Circuit considered whether a PRP that, like Con Ed, had voluntarily incurred response costs could assert a § 107(a) cost recovery claim against other PRPs. *Pinal Creek*, 118 F.3d 1298. The Ninth Circuit, following earlier decisions of several other courts of appeals, reasoned that "[b]ecause *all* PRPs are liable under the statute,

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[12] Confronting similar facts, the New Jersey District Court in *Transtech Indus., Inc.* v. *A&Z Septic Clean*, 798 F. Supp. 1079, 1087 (D.N.J. 1992), found "facetious at best" the argument that cleanup was "voluntary" when it was completed under threat of fines or additional orders as Con Ed's was here. *Compare* C.A. J.A. 11 (First Am. Compl.) (New York "directed Con Edison to investigate and, if necessary, remediate contamination at the MGP Sites").

a claim by one PRP against another PRP necessarily is for contribution" under § 113(f). *Id.* at 1301 (emphasis added).

Pinal Creek rejected for two reasons the argument accepted by the court of appeals in this case that "voluntary" PRPs should enjoy special § 107(a) status in order to promote "rapid and voluntary environmental responses by private parties." *Id.* at 1304. First, *Pinal Creek* rejected the argument as "based on policy considerations which we cannot consider in light of the controlling text, structure, and logic of CERCLA." *Id.* Second, *Pinal Creek* concluded that PRPs have other incentives for volunteering to clean up, including a potentially greater ability to control cleanup costs, the desire to protect ongoing operations, and the likelihood that courts will consider their cooperation if called on to allocate responsibility among PRPs under § 113(f)(1). *Id.* at 1304-05.

Pinal Creek also considered and found unpersuasive the suggestion, made by the Second Circuit here (Pet. App. 15a at n.9), that any difficulty created by allowing PRPs to sue under § 107(a) can be remedied by § 113 counterclaims. *Pinal Creek* said that such an "approach would 'guarantee[ ] inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case.'" 118 F.3d at 1303 (quoting *TH Agric. & Nutrition Co.* v. *Aceto Chem. Co.*, 884 F. Supp. 357, 361 (E.D. Cal. 1995)).

Acknowledging the conflict with *Pinal Creek*, the Second Circuit attempted to dismiss the Ninth Circuit's holding as inconsistent with *Cooper Industries*. Specifically, it construed *Cooper Industries*' *dictum* that § 107(a) and § 113(f) provide "clearly distinct" remedies as being "at odds with *Pinal Creek[ ]*'s view that 'while § 107 created the right of contribution, the "machinery" of § 113 governs and regulates such actions.'" Pet. App. 21a (quoting *Pinal Creek*, 118 F.3d at 1302).

But there is no incongruity. Sections 107 and 113 are distinct in the sense that they provide different types of remedies—§ 107(a) makes certain parties jointly and severally liable to innocent parties (mainly governments) for all cleanup costs, and § 113(f) "creates a mechanism for apportioning that liability among [those] responsible parties," *Pinal Creek*, 118 F.3d at 1302 (quotation omitted). As this Court has also recognized, those sections' claims are "overlapping." *See Key Tronic*, 511 U.S. at 816. Section 107(a) defines the class of persons who may be liable under § 113(f), which, by its terms, authorizes contribution claims against "any other person who is liable or potentially liable under section 9607(a) [i.e., § 107(a)] of this title," 42 U.S.C. § 9613(f)(1).

II. THE UNITED STATES HAS RENOUNCED THE COURT OF APPEALS' DECISION IN THIS CASE AS "UNPERSUASIVE" AND "INCONSISTENT WITH CERCLA'S SETTLEMENT SCHEME"

The United States recently told the Eighth Circuit that the court of appeals' decision in this case (i) is "contrary to [the Eighth Circuit's decision in] *Dico*" (Pet. App. 167a (U.S. *Atl. Research* Br.)), (ii) "conflicts with the First Circuit's decision in *United Techs.* and the Ninth Circuit's decision in *Pinal Creek*" (*id.* at 168a n.23), and (iii) "is inconsistent with CERCLA's settlement scheme and should be rejected" (*id.* at 170a). As the Government previously informed this Court, it "endorses the [formerly] uniform conclusion of the courts of appeals that Section 107(a)(1)-(4)(B) does not provide an independent basis for a liable person to recover response costs from another liable person." U.S. *Cooper Indus.* Br., 2004 WL 354181, at *20 n.9; *see also* U.S. *DuPont* Br. at 50 ("CERCLA is properly interpreted to require that a private PRP's claim against another PRP conform to the Section 113(f) requirements governing contribution.").

As its recent *Atlantic Research* brief demonstrates, the United States continues to read CERCLA in a manner inconsistent with the reading adopted below. In that brief, the United States explains that the Second Circuit erred in this case for three principal reasons.

First, the United States explained that the Second Circuit erred by reading *Cooper Industries*' statement that § 107(a)'s cost recovery remedy and § 113(f)(1)'s contribution remedy are "clearly distinct" to require a deviation from the established CERCLA construction. In the United States's view, the prior courts of appeals' decisions holding that § 113(f) provides the sole PRP remedy recognize that the sections provide "distinct" remedies:

> the courts of appeals decisions limiting PRPs to contribution claims under section 113(f) recognize that the remedies provided by that provision and section 107(a) are distinct. . . . Nevertheless, those courts held that, of the two distinct remedies, the appropriate remedy for allocation claims between PRPs was a contribution claim governed by section 113(f).

Pet. App. 167a.

The United States explained further that the Second Circuit's contention that *Cooper Industries* calls prior decisions into doubt "incorrectly assumes that the courts of appeals disallowed actions by private PRPs under section 107(a)(4)(B) *only* because they assumed that *all* private PRPs who had incurred response costs could use [section] 113(f) to seek contribution." *Id.* at 168a (emphasis in original). As the United States reads *Cooper Industries*, it "did nothing to change the fundamental assumption that underlies the courts of appeals cases: that claims by private PRPs are *necessarily* actions for contribution, which *must* be brought using the express limited mechanisms that Congress provided in section 113(f)." *Id.* at 168a-69a (emphasis in original).

Second, the United States has argued that the court of appeals' decision here "is also wrong because it frustrates the incentives provided by Congress to encourage PRPs to promptly settle their liability with EPA or a State." *Id.* at 169a. It explains that if the court of appeals' § 107(a) claim is available, "[a] PRP that has not been sued under section 106 or 107 would be better off *not* settling its liability with EPA or a State so that it could claim to be a 'volunteer' and sue under the 'substantially more generous provisions of § 107(a).'" *Id.* (quoting *Bedford Affiliates*, 156 F.3d at 424) (emphasis in original).

Third, the United States has stated that the Second Circuit in this case "erred by reading section 107(a)(4)(B) in isolation," *id.*, and by adopting a CERCLA "construction [that] is inconsistent with the contribution protection provided by section § 113(f)(2)," *id.* In particular, the United States understands the court of appeals' holding to be inconsistent with § 113's settlement scheme:

> [I]f a PRP were allowed to avoid section 113(f) and seek reimbursement solely under section 107(a)(4)(B) from a PRP that had settled earlier, it is at best unclear whether section 113(f)(2) would afford contribution protection to the settling party. . . . "[T]hat would throw a proverbial monkey wrench into the works," because "[c]onsent agreements would no longer provide protection, and settling parties would have to endure additional rounds of litigation to apportion their losses."

Id. at 169a-70a (quoting *Reading*, 115 F.3d at 1119).

That the United States has consistently maintained a construction of CERCLA that is contrary to the one now embraced by the court of appeals is a further substantial reason for granting this petition. *Cf. FBI* v. *Abramson*, 456 U.S. 615, 621 (1982).

III. ONLY THIS COURT'S RULING ON WHETHER § 107(a) ALLOWS CONTRIBUTION CAN AVOID NATIONWIDE UNCERTAINTY

A. *Cooper Industries* Recognized the Importance of the § 107(a) Issue but Postponed Its Resolution Until a Case, Like This One, Presented It Squarely

Aviall, the voluntary PRP-plaintiff in *Cooper Industries*, raised the § 107(a) issue for the first time in this Court. The Court explained that the resolution of this issue "may depend in part on the relationship between §§ 107 and 113" and that "[t]hat relationship is a significant issue in its own right." 543 U.S. at 169. Recognizing that resolving the § 107(a) issue would require deciding (i) whether numerous courts of appeals had correctly held that PRPs may not pursue such actions and (ii) whether a PRP "may pursue a § 107 cost recovery action for some form of liability other than joint and several," *id.* at 169-70, the Court remanded the case without ruling on that issue.

Justice Ginsburg, joined by Justice Stevens, in dissent, would have resolved the § 107(a) issue in favor of reading CERCLA to provide a § 107(a) contribution remedy to PRPs. In their view, "[f]ederal courts, prior to the enactment of § 113(f)(1), had correctly held that PRPs could recover [under § 107] a proportionate share of their costs in actions for contribution against other PRPs . . . [and] nothing in § 113 retracts that right." *Id.* at 174 (Ginsburg, J., dissenting) (quotation omitted). They supported their conclusion with a reference to *Key Tronic*'s *dictum* that, as they quoted it, § 107 "'unquestionably provides a cause of action for [potentially responsible persons (PRPs)] to seek recovery of cleanup costs.'" *Id.* at 172 (quoting *Key Tronic*, 511 U.S. at 818 (bracketed text in original)).

What the *Key Tronic dictum* actually states, however, is that "§ 107 unquestionably provides a cause of action for *private parties* to seek recovery of cleanup costs." 511 U.S. at 818 (emphasis added). *Key Tronic* does not express a view on whether private parties *who are also PRPs* have such a right. Nor does *Key Tronic* address whether the "other persons" who may sue under § 107(a) are only persons who, unlike PRPs, are "innocent" of any CERCLA liability. The twelve-year-old *Key Tronic* predates the decisions in *all* circuits holding that PRPs can only sue other PRPs for contribution under § 113(f).[13] Thus, at least those courts have concluded that *Key Tronic*'s *dictum* does *not* resolve whether § 107(a) permits PRPs to sue for contribution.

B. Some Lower Courts Have Misread *Cooper Industries* to Create Substantial Uncertainty Regarding Whether PRPs Can Sue Under § 107(a)

Although the court of appeals here was the first to address this issue since *Cooper Industries*, the Third, Seventh, Eighth, and Ninth Circuits are all currently being asked to revisit their previous holdings that PRPs cannot recover under § 107(a).[14] Perhaps more important, however, is the fact that some

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[13] *See, e.g., Dico*, 340 F.3d at 530; *Bedford Affiliates*, 156 F.3d at 424; *Centerior Serv.*, 153 F.3d at 350; *Pneumo Abex*, 142 F.3d at 776; *Pinal Creek*, 118 F.3d at 1301; *New Castle*, 111 F.3d at 1122; *Redwing Carriers*, 94 F.3d at 1496; *Colo. & E.R.R.*, 50 F.3d at 1536; *United Techs.*, 33 F.3d at 103; *Akzo*, 30 F.3d at 764.

[14] *E.I. DuPont de Nemours & Co.* v. *United States*, No. 04-2096 (3d Cir. filed April 27, 2004); *Metro. Water Reclamation Dist. of Greater Chicago* v. *Lake River Corp.*, No. 05-8016 (7th Cir. leave to appeal granted July 29, 2005); *Atl. Research Corp.* v. *United States*, No. 05-3152 (8th Cir. filed Aug. 8, 2005) (argued March 16, 2006); *City of Rialto* v. *U.S. Dep't of Def.*, No. 05-56749 (9th Cir. filed Nov. 22, 2005); *Kotrous* v. *Goss-Jewett Co.*, No. 06-15162 (9th Cir. leave to appeal granted Jan. 27, 2006).

district courts have concluded that *Cooper Industries* frees them from adherence to binding (and previously uniform) circuit precedent and permits them to hold that PRPs that cannot avail themselves of § 113(f) may maintain a claim for contribution under § 107(a).

Some of these courts, like the court of appeals below, appear motivated by a desire to ensure that PRPs that have incurred cleanup costs have a contribution remedy even if they have disqualified themselves from pursuing § 113(f) contribution claims by failing to meet the conditions on that claim. Several district courts in circuits that have prohibited § 107(a) PRP claims have concluded that *Cooper Industries*' "limitation" on § 113(f) contribution claims authorizes ignoring these precedents.

In *Metropolitan Water Reclamation District of Greater Chicago* v. *Lake River Corp.*, for example, the District Court for the Northern District of Illinois considered whether a plaintiff that was a PRP under § 107(a), because it was "an owner of the contaminated property," but that voluntarily undertook cleanup efforts could "seek contribution from other responsible parties under § 107(a)." 365 F. Supp. 2d 913, 915-16, 918 (N.D. Ill. 2005) (interlocutory appeal pending). Although the court recognized that "[t]he Seventh Circuit has yet to allow a claim made by a PRP to go forward on the basis of an implied right to contribution under § 107(a)," *id.* at 917, the district court ruled that it "agree[d] with the dissenters in [*Cooper Industries* v.] *Aviall*, insofar as they express a prediction of the result that would occur when the Court had to decide the question, that if the implied right existed before § 113(f)(1) was added and the right was not encompassed by § 113(f)(1), then it must still lie in § 107(a)," *id.* at 918.

Metropolitan Water Reclamation District is not alone in reading *Cooper Industries* to require a new direction on the § 107 issue. Taking a similar view, California district courts

have held—contrary to the Ninth Circuit's holding in *Pinal Creek* and Congress's § 113 contribution conditions—that PRPs who clean up voluntarily have a contribution action. *See, e.g., Kotrous* v. *Goss-Jewett Co.*, No. CIV. S02-1520 FCD JFM, 2005 WL 1417152, at *3 (E.D. Cal. June 16, 2005) (appeal filed Oct. 21, 2005) ("a PRP may maintain a claim for contribution under § 107(a)"); *Adobe Lumber, Inc.* v. *Taecker*, No. CV S02-186 GEB GGH, 2005 WL 1367065, at *1 (E.D. Cal. May 24, 2005) (concluding that, in the wake of *Cooper Industries*, a "§ 107 claim is construed as it was before the congressional enactment of § 113"). And, at least one district court has read broadly the Second Circuit's decision in this case to suggest that a § 107(a) contribution claim is available to any PRP. *See United States* v. *Horne*, No. 05-0497 CV W NKL, 2006 WL 290591, at *7 (W.D. Mo. Feb. 6, 2006).[15]

Other courts, however, have not been persuaded that *Cooper Industries* signals a new rule that allows PRPs to recover their costs under § 107(a). *See, e.g., Boarhead Farm Agreement Group* v. *Advanced Envtl. Tech. Corp.*, 381 F. Supp. 2d 427, 435 (E.D. Pa. 2005); *Mercury Mall Assocs., Inc.* v. *Nick's Mkt., Inc.*, 368 F. Supp. 2d 513, 519-20 (E.D. Va. 2005).

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[15] *See also Viacom, Inc.* v. *United States*, 404 F. Supp. 2d 3, 7 (D.D.C. 2005) ("in light of [*Cooper Industries* v.] *Aviall*, a PRP that cannot sue for contribution for voluntary cleanup costs under § 113(f) may still seek to recover its costs in a § 107(a) proceeding"); *Vine Street L.L.C.* v. *Keeling*, 362 F. Supp. 2d 754, 763 (E.D. Tex. 2005) ("in the situation where a potentially responsible party cannot meet the specific requirements to state a claim for contribution under Section 113(f)(1), the Court concludes that a potentially responsible party can bring a claim under Section 107(a)(4)(B)"); *Aggio* v. *Aggio*, No. C 04-4357 PJH, 2005 WL 2277037, at *5 (N.D. Cal. Sept. 19, 2005) (after *Cooper Industries*, "a PRP has an implied right to seek contribution under § 107(a)"); *Ferguson* v. *Arcata Redwood Co.*, No. C 03-05632 SI, 2005 WL 1869445, at *6 (N.D. Cal. Aug. 5, 2005) (same).

* * * *

Cooper Industries recognized that the § 107 issue presented here is one of "importance," 543 U.S. at 170, and two Justices would have there resolved the issue, even though it had not been fully briefed and even though the courts of appeals were then in agreement that CERCLA does not provide PRPs a § 107 claim. Since last Term, the issue's importance has increased exponentially: PRPs unable to meet the § 113(f) contribution requirements have argued, in several instances successfully, that *Cooper Industries*' literal reading of § 113(f) requires turning back the clock to allow a § 107 PRP claim that some courts read into CERCLA before SARA. By doing so, these courts have rendered uncertain the answers to important questions facing private PRPs, including the availability of contribution actions, the scope of contribution liability to other PRPs, and the risks and benefits of refusing to cooperate with government enforcement agencies in favor of private cost recovery actions.

The court of appeals' decision in this case exacerbates the problem by creating a sharp circuit conflict on the § 107 issue. By basing its erroneous result on a misreading of *Cooper Industries*, that decision provides a fertile medium for continued litigation across the Nation. More, rather than less, uncertainty will arise, as every other court of appeals is asked to reexamine its rule and adopt the Second Circuit's unmanageable "voluntary PRP" claim. Given the high stakes at risk in cleanup litigation, parties will be compelled in every case to preserve the claim until it is finally resolved by the Court.

The issue is squarely presented here. Continued litigation is unlikely to reveal new considerations not already vetted by ten courts of appeals and will burden unnecessarily the lower courts and countless litigants. The Court should resolve the issue in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON *
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

* Counsel of Record

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2004

(Argued: May 20, 2005 Decided: September 9, 2005)

Docket No. 04-2409-cv

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff-Appellant,

v.

UGI UTILITIES, INC.,
Defendant-Appellee.

Before:

KATZMANN, HALL, *Circuit Judges*, and MURTHA, *District Judge*.[1]

The plaintiff-appellant appeals from the district court's grant of summary judgment to the defendant-appellee on 1) certain of the plaintiff-appellant's claims of operator liability under CERCLA, and 2) the defendant-appellee's claim that it had been released from liability for the plaintiff-appellant's other operator liability claims. We conclude in this opinion that subject matter jurisdiction exists in this matter because the plaintiff-appellant seeks to recover costs of response under CERCLA section 107(a), and the action thus arises under that section. We address the substantive summary judgment issues in a separate summary order. Accordingly, we AFFIRM in part and REVERSE in part and remand for further proceedings.

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[1] Hon. J. Garvan Murtha, United States District Judge for the District of Vermont, sitting by designation.

KATZMANN, Circuit Judge.

In this action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Con Edison ("Con Ed") seeks to be reimbursed by UGI Utilities, Inc. ("UGI") for costs it has incurred cleaning up certain contaminated sites in Westchester County, New York. The district court (Chin, *J.*) granted summary judgment to UGI on all claims. *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 310 F.Supp.2d 592, 610 (S.D.N.Y.2004). In this opinion, we address whether, in light of a recent Supreme Court decision, *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004), subject matter jurisdiction exists in this case. We conclude that it does because Con Ed's claims arise under CERCLA. In a summary order issued simultaneously with this opinion, we analyze the merits of the district court's summary judgment grant. We affirm in part and reverse in part and remand for further proceedings.

BACKGROUND

This litigation concerns the cleanup of sites in Westchester County that allegedly were contaminated by operations at Manufactured Gas Plants, industrial facilities at which gas was produced from coal, oil, or other energy sources.[2] In October 1999, the New York State Department of Environ-

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[2] According to the website of the New York State Department of Environmental Conservation, in such plants, gas was stored, and then piped to the surrounding area, where it was used for lighting, cooking, and heating homes and businesses. Manufactured Gas Plants were first built before the Civil War, and were generally closed during the first half of the twentieth century. The plants would generate a variety of contaminants, including coal tar, an oily liquid created during gas production and distribution, and purifier waste, generated when cyanide and sulfur were removed from the manufactured gas. N.Y. State Dep't of Envtl. Conservation, *General Information About MGPs, at* http://www.dec.state.ny.us/website/der/mgp/mgp_faq.html#mgp.

mental Conservation (the "Department") asked Con Ed for information about locations at which the company or its predecessors formerly operated Manufactured Gas Plants. Con Ed owns or operates many such plants, including ten in Westchester County, New York (the "Westchester Plants").[3] On August 15, 2002, Con Ed entered into a "Voluntary Cleanup Agreement" to clean up more than 100 sites at which Con Edison or its predecessors might have formerly owned or operated Manufactured Gas Plants. These sites apparently included the sites of seven of the ten Westchester Plants.[4]

Prior to entering into this Voluntary Cleanup Agreement, Con Ed sued UGI seeking to recoup costs Con Ed had incurred and would incur in cleaning up sites allegedly contaminated by the ten Westchester Plants. Con Ed represents that it has already expended in excess of $4 million to investigate and clean up the sites of the Westchester Plants, and that the total amount to complete investigation and cleanup may exceed $100 million. Con Ed alleges that UGI or its predecessors operated the Westchester Plants, and that UGI is thus liable for remedial costs under CERCLA, as well as under New York State Navigation Law and negligence law.

On July 2, 2003, UGI moved for summary judgment on Con Ed's claims against it. On November 25, 2003, the district court heard oral argument, at the conclusion of which

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[3] The Westchester Plants are the Mount Vernon Plant, the New Rochelle Plant, the Pelham Plant, the Port Chester Plant, the Rye Plant, the Tarrytown Plant, the White Plains Plant, the Ludlow Street Plant in Yonkers, the Nepperhan Avenue Plant in Yonkers, and the Woodworth Avenue Plant in Yonkers.

[4] The plants whose sites were covered in the Voluntary Cleanup Agreement were the Mount Vernon Plant, the New Rochelle Plant, the Pelham Plant, the Rye Plant, the Ludlow Street Plant in Yonkers, the Nepperhan Avenue Plant in Yonkers, and the Woodworth Avenue Plant in Yonkers.

the court dismissed Con Ed's veil-piercing claims and state law claims, as well as all claims relating to the three Westchester Plants located in Yonkers, based on a release granted to UGI. After initially reserving judgment on the operator claims concerning the remaining Westchester Plants, the district court, on March 29, 2004, granted UGI's motion for summary judgment in its entirety, finding that no reasonable juror could conclude that UGI is subject to operator liability under CERCLA with respect to the Westchester Plants not located in Yonkers.

Con Ed appealed on May 4, 2004, arguing that the district court erred in granting UGI summary judgment on 1) Con Ed's CERCLA operator liability claims as to the Westchester Plants not located in Yonkers, and 2) UGI's claim that it was released from liability as to the Westchester Plants located in Yonkers.

After the parties had completed briefing these issues, but before oral argument, the Supreme Court issued its decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004). In that decision, which we discuss below, the Court held that a party may only pursue a contribution claim under CERCLA section 113(f)(1) during or following a civil action as specified in that section. *Id.* at 583. Because no civil action has been filed against Con Ed concerning the sites of the Westchester Plants, and the First Amended Complaint states that this action is brought pursuant to section 113(f)(1), we requested additional briefing on whether subject matter jurisdiction exists in this action, in light of *Cooper Industries*. This court held oral argument on May 20, 2005.

DISCUSSION

A. The CERCLA Cost Recovery and Contribution Framework

CERCLA is a comprehensive federal law governing the remediation of sites contaminated with pollutants. Two of its primary goals include "encourag [ing] the timely cleanup of

hazardous waste sites," and "plac[ing] the cost of that [cleanup] on those responsible for creating or maintaining the hazardous condition." *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935-36 (8th Cir.1995) (internal quotations marks and citations omitted); *see also Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n. 13 (1994) ("'CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.'") (quoting *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842, 847 (1993)); H.R. Rep. No. 96-1016(I), at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 (stating that CERCLA's purposes include furthering the recovery of costs for cleanup of hazardous waste sites "from persons liable therefor" and inducing those persons "voluntarily to pursue appropriate environmental response actions").

In order to achieve these goals, CERCLA, in three separate and different provisions, authorizes parties to recoup money spent to clean up and prevent future pollution at contaminated sites or to reimburse others for cleanup and prevention at contaminated sites: (1) section 107(a), which permits the general recovery of cleanup and prevention costs; (2) section 113(f)(1), which creates a contribution right for parties liable or potentially liable under CERCLA; and (3) section 113(f)(3)(B), which creates a contribution right for parties that have resolved their liability by settlement.

Section 107(a) states that various persons, including the owner or operator of a facility, may be held liable for, among other things, "all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). Pursuant to this provision, the government routinely brings suits to obtain reimbursement for the costs—also known as response costs—of cleaning up and preventing future contamination at a site. *See, e.g., United States v. LTV Corp.*, 944 F.2d 997, 999 (2d Cir. 1991). In addition to

permitting these suits by the federal government and the states, section 107(a) also permits private parties to pursue such "cost recovery" actions, as it makes specified entities liable for "any other necessary costs of response incurred by *any other person* consistent with the national contingency plan." § 9607(a)(4)(B) (emphasis added); *see also Key Tronic Corp.*,511 U.S. at 818 (noting that section 107(a) "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs"); *Prisco v. A & D Carting Corp.*, 168 F.3d 593, 602 (2d Cir.1999) (stating that section 107(a) "provides a private right of action for the recovery of [response] costs in certain circumstances").

Section 113(f)(1) expressly creates a contribution right for parties liable or potentially liable under CERCLA. It states that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [section 107(a)], during or following any civil action under [section 106] or under [section 107(a)]."[5] 42 U.S.C. § 9613(f)(1). In *Cooper Industries*, the Supreme Court considered whether a private party who has not been sued under section 106 or section 107(a) may nevertheless obtain contribution under section 113(f)(1) from other liable parties. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577, 580 (2004). The Court concluded, as we will discuss further below, that the "natural meaning" of section 113(f)(1) "is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." *Cooper Industries*, 125 S.Ct. at 583 (quoting 42 U.S.C. § 9613(f)(1)). Consequently, the Court held that section 113(f)(1) does not support the suit of a party that has

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[5] CERCLA section 106 states that when the President determines that "an imminent and substantial endangerment" to the public or the environment exists, the United States may "secure such relief as may be necessary to abate such danger or threat," and grants the federal district courts jurisdiction to grant such relief. 42 U.S.C. § 9606(a).

not been the subject of judicial or administrative measures to compel cleanup. *Id.* at 582, 586.

Finally, section 113(f)(3)(B) creates contribution rights for settling parties. It provides that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person" that has not itself settled with the United States. 42 U.S.C. § 9613(f)(3)(B).

For subject matter jurisdiction to exist in this case, Con Ed's claims must have arisen under one of the above provisions. *See* 28 U.S.C. § 1331 (granting the federal district courts jurisdiction of "civil actions arising under the . . . laws . . . of the United States"); *see also Barbara v. New York Stock Exch.*, 99 F.3d 49, 53 (2d Cir.1996). Con Ed effectively concedes that, in the wake of *Cooper Industries,* it cannot bring its suit under section 113(f)(1) because it has not been sued in a civil action as specified in that section. Con Ed contends, however, that its claims arise, and that the court, therefore, has subject matter jurisdiction, under section 113(f)(3)(B). We disagree, but hold that subject matter jurisdiction exists pursuant to section 107(a).

B. Subject Matter Jurisdiction Does Not Exist Under Section 113(f)(3)(B)

Con Ed argues that its Voluntary Cleanup Agreement with the Department constitutes a section 113(f)(3)(B) administrative settlement, that it has, as a result, "resolved its liability to . . . a State . . . in an administrative or judicially approved settlement," 42 U.S.C. § 9613(f)(3)(B), and that it should be permitted to pursue a cause of action under this provision.

We read section 113(f)(3)(B) to create a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved. This seems

clear because resolution of liability for "response action[s]" is a prerequisite to a section 113(f)(3)(B) suit—and a "response action" is a *CERCLA*-specific term describing an action to clean up a site or minimize the release of contaminants in the future.[6] Moreover, the legislative history of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), which enacted section 113, confirms this reading. The report of the House Committee on Energy and Commerce accompanying SARA states that section 113 "clarifies and confirms the right of a person held jointly and severally liable *under CERCLA* to seek contribution from other potentially liable parties." H.R.Rep. No. 99-253(I), at 79 (1985) (emphasis added). The report of the Senate Environment and Public Works Committee contains similar language. *See* S. Rep. 99-11, at 44 (1985). This history makes no mention of any intent to meddle with the contribution rules governing settlement of non-CERCLA claims. Accordingly, we believe section 113(f)(3)(B) does not permit contribution actions based on the resolution of liability for state law—but not CERCLA—claims. *See W.R. Grace & Co. v. Zotos Int'l, Inc.*, 98-CV-838S(F) 2005 U.S. Dist. LEXIS 8755, at *23 (W.D.N.Y. May 3, 2005) ("Just as a party must be sued under CERCLA before it can maintain a section 113(f)(1) contribution claim, it must settle CERCLA liability before it can maintain a claim under section 113(f)(3).").

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[6] CERCLA defines the term "response" to mean "remove, removal, remedy, and remedial action" and all "enforcement activities related thereto." 42 U.S.C. § 9601(25). "The terms 'remove' or 'removal' means [*inter alia*] the cleanup or removal of released hazardous substances from the environment." *Id.* § 9601(23). The terms "remedy" or "remedial action" mean *inter alia* "those actions consistent with permanent remedy taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances." *Id.* § 9601(24).

We also note that the term "response action" is used throughout the statute. *See, e.g., id.* §§ 9601(20)(E)(ii)(II), 9601(22), 9605(10), 9607(1)(2)(A).

The operative question in deciding whether Con Ed's claims arise under section 113(f)(3)(B), then, is whether Con Ed resolved its CERCLA liability before bringing suit against UGI.

In the Voluntary Cleanup Agreement, the Department promised that if Con Ed cleaned up the properties specified in the agreement according to the agreement's terms, the Department would furnish Con Ed with a Release and Covenant Not to Sue. The Release and Covenant Not to Sue states that the Department "releases, covenants not to sue, and shall forebear from bringing any action, proceeding, or suit pursuant to the [New York] Environmental Conservation Law, the Navigation Law or the State Finance Law, and from referring to the Attorney General any claim for recovery of costs incurred by the Department . . . for the further investigation and remediation of the Site, based upon the release or threatened release of Covered Contamination." This language makes clear, contrary to Con Ed's contentions, that the only liability that might some day be resolved under the Voluntary Cleanup Agreement is liability for state law--not CERCLA—claims.[7]

To be sure, the Voluntary Cleanup Agreement does refer to CERCLA in its "Reservation of Rights" section. There, the agreement states:

> Except for the Department's right to take any investigatory or remedial action deemed necessary as a result of a significant threat resulting from the Existing Contamination or to exercise summary abatement powers,

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[7] At oral argument, Con Ed argued that even if the releases from liability under the Environmental Conservation Law, the Navigation Law, and the State Finance Law do not serve to release Con Ed from CERCLA liability, the more general promise not to refer claims for recovery of costs to the state's Attorney General does. The promise not to refer does nothing, however, to resolve Con Ed's liability for CERCLA claims.

> the Department shall not take any enforcement action under [Environmental Conservation Law] Article 27, Title 13, under CERCLA, under the [Navigation Law], or under comparable statutory or common law theories of remedial liability with respect to the Existing Contamination, to the extent that such contamination is being addressed under the Agreement, against Volunteer or Volunteer's grantees, successors or assigns during the implementation of this Agreement, provided such party is in compliance with the terms and provisions of this Agreement, including without limitation the requirements of all Work Plans and amendments thereto.

However, this language cannot be construed to have resolved Con Ed's CERCLA liability. In fact, the exception enunciated at the beginning of this section of the agreement—which reserves the Department's right to take action under CERCLA "deemed necessary as a result of a significant threat resulting from the Existing Contamination or to exercise summary abatement powers"—leaves open the possibility that the Department might still seek to hold Con Ed liable under CERCLA. Moreover, to the extent that this language affords Con Ed any protection at all, that protection only lasts "during the implementation of this Agreement," i.e., while Con Ed is cleaning up the designated sites. Once the cleanup is completed, the Department will apparently regain the rights relinquished in this section of the agreement, and grant Con Ed only the releases specified in the Release and Covenant Not to Sue. This language, therefore, does not in any way suggest that Con Ed resolved its liability to the Department under CERCLA.

For these reasons, we conclude that Con Ed may not pursue its action under section 113(f)(3)(B).

C. Subject Matter Jurisdiction Does Exist Under Section 107(a)

We believe, however, that Con Ed may pursue its suit under section 107(a) because, in light of *Cooper Industries*, Con Ed's costs to clean up the sites of the Westchester Plants are "costs of response" within the meaning of that section.

After CERCLA's enactment in 1980 but before section 113(f)(1) was enacted, certain courts held that section 107(a) permitted certain private parties that, if sued, would be held liable under section 107(a)—often called "potentially responsible persons," or "PRPs"—to sue other parties to recover response costs incurred voluntarily.[8] *See Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-92 (9th Cir.1986); *Pinole Point Props., Inc. v. Bethlehem Steel Corp.*, 596 F.Supp. 283, 290-91 (N.D. Cal.1984); *City of Philadelphia v. Stepan Chemical Co.*, 544 F.Supp. 1135, 1143 (E.D.Pa.1982). Section 107(a) does not, however, grant to parties against whom liability has been imposed any express right to sue other parties for contribution, which *Black's* defines as "[t]he right that gives one of several persons who are liable on a common debt the ability to recover ratably from each of the others." *Black's Law Dictionary* 352 (8th ed. 2004); *see also United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 99 (1st Cir.1994) (defining contribution as "a claim by and between jointly and severally liable parties for an appropriate division of the

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[8] This opinion generally eschews the terms "potentially responsible person" and "PRP," which do not appear anywhere in the text of either CERCLA section 107 or section 113(f). The terms strike us as vague and imprecise because, when no action has been filed nor fact-finding conducted, *any* person is *conceivably* a responsible party under CERCLA. Moreover, we believe the term may be read to confer on a party that has not been held liable a legal status that it should not bear. We believe our alternative designation—a party that, if sued, would be held liable under section 107(a)—is more precise.

payment one of them has been compelled to make.") (internal quotation marks and citation omitted). Despite the omission of express contribution language, certain courts had held, before the enactment of section 113(f)(1), that CERCLA did in fact establish contribution rights. *See Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916-17 (N.D.Okla. 1987) (holding that a CERCLA contribution right existed as a matter of federal common law); *United States v. New Castle County*, 642 F. Supp. 1258, 1262-69 (D.Del.1986) (same); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 227-29 (W.D.Mo.1985) (holding that a CERCLA contribution right was implied in the statute's language). *But see United States v. Westinghouse Elec. Corp.*,No. IP83-9-C, 1983 U.S. Dist. LEXIS 15850, at *9-*14 (S.D.Ind. June 29, 1983) (declining to find a CERCLA contribution right).

Congress amended CERCLA when it passed SARA in 1986. *See generally* Pub.L. No. 99-499, 100 Stat. 1613. That legislation enacted section 113(f)(1), which, as described *supra*, creates an express cause of action for contribution. 42 U.S.C. § 9613(f)(1).

After section 113(f)(1)'s enactment, this circuit considered the relationship between section 107(a) and section 113(f)(1) in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir.1998). In that case, negotiations between the plaintiff Bedford and the Department had culminated in two consent orders pursuant to which Bedford agreed to clean up contamination at a site it owned. *Id.* at 421. Bedford then sought recovery in the district court under both section 107(a) and section 113(f)(1). *Id.* at 422. The district court denied Bedford's section 107(a) claim but ruled that it was entitled to contribution under section 113(f)(1). *Id.* In equitably apportioning responsibility for the response costs, the district court found that Bedford was liable for five percent of those costs based on its ownership of the contaminated site and was thus limited to recovering only ninety-five percent of what it was seeking.

Id. On appeal, Bedford challenged the district court's ruling that it was not entitled to proceed under section 107(a), and, importantly, it argued that it should be able to recover one hundred percent of its costs. *Id.* at 423.

This court observed that "[t]o bring a derivative action to recoup the portion of costs exceeding a potentially responsible person's equitable share of the overall liability . . . is a quintessential claim for contribution, where a party seeks to apportion liability for an injury for which it is also directly liable." *Id.* at 424. Concluding that CERCLA § 113(f) "plainly governs such contribution actions," this court reasoned that the plaintiff "could not pursue a § 107(a) cost recovery claim against [the defendants] due to its status as a potentially responsible person." *Id.* at 423-24. The court observed that section 113(f)(1) has a three-year statute of limitations, whereas section 107(a) has a six-year statute of limitations, and added that "[w]ere we to permit a potentially responsible person to elect recovery under either § 107(a) or § 113(f)(1), § 113(f)(1) would be rendered meaningless," because "[a] recovering liable party would readily abandon a § 113(f)(1) suit in favor of the substantially more generous provisions of § 107(a)." *Id.* at 424. Thus, in *Bedford Affiliates*, the court proceeded to analyze the plaintiff's claim only as one for contribution under section 113(f)(1). *Id.* at 425, 427-30.

Con Ed appears willing to accept that *Bedford Affiliates* stands for the proposition that section 107(a) may never provide a right of action for a party that, if sued, would be held liable under that section. We disagree, concluding that the facts of *Bedford Affiliates* differ from the case before us in a significant way. Before we explain that difference—and the reason why we need not revisit *Bedford Affiliates*'s section 107(a) holding—we lay out our own understanding of how, in light of *Cooper Industries*, section 107(a) applies to the facts of this case.

Following the enactment of section 113(f), some courts concluded that even though any party could seek reimbursement for costs under section 107(a), actions by parties that might themselves be liable under section 107(a) were "necessarily actions for contribution, and [were] therefore governed by the mechanisms set forth in § 113(f)." *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350 (6th Cir.1998). *See also Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir.1997) ("[W]hile § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107.").

In *Cooper Industries*, however, the Supreme Court expressly stated that the section 107(a) cost recovery remedy and the section 113(f)(1) contribution remedy, though "similar at a general level in that they both allow private parties to recoup costs from other private parties," are "clearly distinct." *Id.* at 582 n. 3. Moreover, the Court held in *Cooper Industries* that a section 113(f)(1) action is only available during or following a specified civil action. *Cooper Industries*, 125 S.Ct. at 583. This holding impels us to conclude that it no longer makes sense to view section 113(f)(1) as the means by which the section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under section 107(a). Each of those sections, 107(a) and 113(f)(1), embodies a mechanism for cost recovery available to persons in different procedural circumstances.

Given that section 107(a) is distinct and independent from section 113(f)(1), and that section 113(f)(1)'s remedies are not available to a person in the absence of a civil action as specified in that section, determining whether a party in Con Ed's circumstances may sue under section 107(a) is easily resolved based on that section's plain language. Section 107(a) makes parties liable for the government's remedial and

removal costs and for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The only questions we must answer are whether Con Ed is a "person" and whether it has incurred "costs of response." We have no doubt that Con Ed is a "person" under CERCLA because it is a "firm" or "corporation" within the meaning of the act. 42 U.S.C. § 9601(21). Moreover, Con Ed has incurred and is incurring "costs of response," in that it is incurring costs of "removal" and "remedial action," § 9601(25), at the sites of the Westchester Plants, and those costs were not imposed on Con Ed as the result of an administrative or court order or judgment.

Unlike some other courts, we find no basis for reading into this language a distinction between so-called "innocent" parties and parties that, if sued, would be held liable under section 107(a). *See, e.g., United Techs. Corp.*, 33 F.3d at 100 ("[I]t is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures."). Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of section 107(a) require that the party seeking necessary costs of response be innocent of wrongdoing.[9]

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[9] Some might argue that a person who, if sued, would be partly liable for necessary costs of response may be unjustly enriched if allowed under section 107(a) to recover 100 percent of its costs from other persons. This fear seems misplaced. While we express no opinion as to the efficacy of such a procedure, there appears to be no bar precluding a person sued under section 107(a) from bringing a counterclaim under section 113(f)(1) for offsetting contribution against the plaintiff volunteer who, if sued, would be liable under section 107(a). *See, e.g., Blasland, Bouck & Lee v. City of N. Miami*, 283 F.3d 1286, 1292 (11th Cir. 2002) (observing that plaintiff, an engineering firm, had sued City asserting CERCLA claims, and City had counterclaimed for CERCLA contribution); *Dent v. Beazer*

Moreover, we believe we would be impermissibly discouraging voluntary cleanup were we to read section 107(a) to preclude parties that, if sued, would be held liable under section 107(a) from recovering necessary response costs. Were this economic disincentive in place, such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit. *See Syms v. Olin Corp.*, 408 F.3d 95, 106 n.8 (2d Cir. 2005) (observing that "the combination of *Cooper Industries* and *Bedford Affiliates* . . . would create a perverse incentive for PRPs to wait until they are sued before incurring response costs").[10] This would undercut one of CERCLA's main goals, "'encourag[ing] private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.'" *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) (quoting *FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 847 (1993)).

For these reasons, we hold that section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held

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Materials & Servs., 156 F.3d 523, 527 (4th Cir. 1998) (stating that the plaintiff had filed claims under section 107(a) and section 113(f)(1), and that the defendant had filed "generally corresponding CERCLA counterclaims"); *Redwing Carriers v. Saraland Apts.*, 94 F.3d 1489, 1495 (11th Cir. 1996) (stating that the plaintiff had sued the defendants under sections 107(a) and 113(f), and the defendants had counterclaimed under section 113(f)).

[10] In *Syms*, this court faced the same question we face here: the effect of *Cooper Industries* on section 107(a). In that case, *Cooper Industries* had been issued after the court had heard oral argument, and the court elected not to decide the issue but rather to permit the district court to consider the issue on remand. *Id.* at 106-07. Here, where *Cooper Industries* was issued well before oral argument, and the parties submitted, at the court's request, briefs on this purely legal issue, remand is unnecessary and would only delay resolution of this matter.

liable under section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment.[11]

This holding does not require us to revisit *Bedford Affiliates* because of critical distinctions between that case and this one.[12]

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[11] This is, of course, consistent with the view that courts took of section 107(a) before section 113(f)(1) was enacted. *See Wickland*, 792 F.2d at 891-92, *Pinole Point Props., Inc.*, 596 F.Supp. at 290-91, *Stepan Chemical Co.*, 544 F.Supp. at 1143.

[12] Generally, "this court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*." *BankBoston, N.A. v. Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (quotation marks and citation omitted). *Bedford Affiliates's* implicit holding that a plaintiff may proceed under section 113(f)(1) in the absence of a section 106 or 107(a) action has apparently been superseded by *Cooper Industries*. We have also observed that we may depart from a prior decision when it merely "has been called into question by an intervening United States Supreme Court decision." *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 69 (2d Cir. 2004) (quotation marks and citation omitted) (vacated on other grounds); *see also* Hon. Jon O. Newman, *Foreword: In Banc Practices in the Second Circuit: The Virtues of Restraint*, 50 Brook. L. Rev. 365, 370 (1984) ("An in banc consideration has not been thought necessary, however, to discard a precedent eroded by an intervening decision of the Supreme Court."). *Cooper Industries* may call into question the rationale of *Bedford Affiliates's* section 107(a) holding. Certainly, it no longer makes sense to argue that permitting a potentially responsible person to sue under section 107(a) would render section 113(f)(1)'s statute of limitations meaningless because a party proceeding in the absence of a civil action no longer has the option of suing under section 113(f)(1). *See Bedford Affiliates*, 156 F.3d at 424. Consequently, it might be argued that, in the wake of *Cooper Industries*, Bedford Affiliates's section 107(a) holding can no longer stand. We need only make this determination, however, if our section 107(a) holding conflicts with *Bedford Affiliates's* section 107(a) holding. Because it does not, we decline to answer the question whether a three-judge panel of this court may depart from *Bedford Affiliates's* section 107(a) holding.

First, unlike in this case where there has been no adjudication of Con Ed's liability for response costs and no administrative or judicially approved settlement requiring Con Ed to incur those expenses, in *Bedford Affiliates*, the plaintiff had entered into two consent orders with the Department, pursuant to which the plaintiff began cleanup and remedial action. *Bedford Affiliates,* 156 F.3d at 421. "An administrative consent order is a final agency order which is reviewable as if it were the product of a hearing.'" *A.R. v. N.Y. City Dep't of Educ.*, 407 F.3d 65 n.12 (2d Cir. 2005) (quoting 2 Charles H. Koch, Jr., Administrative Law and Practice § 5.43, at 155 (2d ed.1997)).

It may be that when a party expends funds for cleanup solely due to the imposition of liability through a final administrative order, it has not, in fact, incurred "necessary costs of response" within the meaning of section 107(a). As the District Court for the Middle District of North Carolina stated in *United States v. Taylor,* 909 F.Supp. 355 (M.D.N.C. 1995), when a party "does not conduct its own cleanup, it has not incurred recovery costs." *Id.* at 365. If a party expends funds out of obligation under an administrative or court order or final judgment, its liability may be "similar to that of a tort feasor's liability for the doctor's bills of the injured party. Payment by the tort feasor does not mean it has incurred doctor's bills itself." *Id.; see* Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties,* 21 Harv. Envtl. L.Rev. 83, 95-97 (1997) (suggesting that section 107(a) does not expressly authorize suits seeking costs of liability imposed in a prior recovery action or settlement).[13]

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[13] We note, however, that even decisions stating that the imposition of liability may create expenditures that are not costs of response have confined their holding to liability imposed through court proceedings. *Taylor* held that a party subjected to a court-approved settlement or

Second, the *Bedford Affiliates* plaintiff, having agreed to the consent order, put the extent of its liability at issue by proceeding to seek recovery under both sections 107(a) and 113(f)(1). As noted, under section 113(f), the district court found that the plaintiff was partially liable for the costs of response. To rule that in those circumstances Bedford could have proceeded under section 107(a) to seek recovery of one hundred percent of the costs, this court would have had to hold in substance that a party already adjudicated liable for a portion of the costs of response under section 113(f)(1) could circumvent that section by recovering under section 107(a) that portion of the costs attributed to it by the adjudication. That is, having found that the district court did not abuse its discretion in attributing to Bedford responsibility for five percent of the necessary response costs, the court did not have to reach the question of whether Bedford could proceed under section 107(a) to recoup those costs.

Here, there have been no consent orders and no proceeding apportioning necessary costs of response to Con Ed, and these differences distinguish this case from *Bedford Affiliates*. In sum, we read *Bedford Affiliates* to hold that a party that has incurred or is incurring expenditures under a consent order with a government agency and has been found partially liable under section 113(f)(1) may not seek to recoup those ex-

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judgment was limited to the contribution remedy, but also stated that a party implementing response or remedial activity under an administrative order incurs "necessary costs of response" under section 107(a). *Id.* at 363; *see New Castle County*, 642 F.Supp. at 1262 ("[I]t is not clear that once a responsible party *has been sued* his monetary expenditures to abate an environmental hazard qualify as 'necessary costs of response' under the Act.") (emphasis added); Hernandez, *supra*, at 124 (arguing that a party that cleans up a site under an administrative order should have both a section 107(a) cost recovery claim and a contribution claim). If expenditures under an administrative order *are* costs of response, *Bedford Affiliates* would apparently require revisiting. We need not and do not decide these questions here.

penditures under section 107(a). Our holding here—that a party that has not been sued or made to participate in an administrative proceeding, but, if sued, would itself be liable under section 107(a), may still recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment—does not conflict with *Bedford Affiliates*.

We are, of course, cognizant that the Supreme Court in *Cooper Industries* declined to resolve whether a party that would itself be liable under section 107(a) may bring a section 107(a) cost recovery action. *See Cooper Industries*, 125 S.Ct. at 584. *But see id.* at 588 (Ginsburg, *J.*, dissenting) (urging the court to permit such parties to proceed under section 107(a)). This fact does not weigh on one side or the other in our analysis here. In justifying its refusal to resolve the question, the Court cited a long list of circuit court cases—including *Bedford Affiliates*—stating that so-called PRPs could not pursue a section 107(a) action. *See id.* at 585. All but one of those cases are inapposite for the reason described *supra:* they considered plaintiffs that had either been held liable—or, because they had been sued, might imminently be held liable—under an administrative or court order or judgment. *See Centerior Serv.*, 153 F.3d at 346 (stating that "the EPA issued a unilateral Administrative Order to the plaintiffs"); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 773 (4th Cir. 1998) (stating that the plaintiff "began response activities at the site pursuant to state and federal EPA orders"); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119 (3d Cir. 1997) (stating that the United States had filed suit against the plaintiff); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1495 (11th Cir. 1996) (stating that the plaintiff had entered into two consent orders with the EPA); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1533 (10th Cir. 1995) (stating that the party seeking to assert section 107(a) claims against third-party defendants had been sued by the EPA); *United Techs. Corp. v.*

Browning-Ferris Inc., Civil No. 92-0206-B, 1993 U.S. Dist. LEXIS 19160, at *2-*3 (D.Me. May 27, 1993) (stating that the United States had filed a civil action under CERCLA against a predecessor of the plaintiff in *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96 (1st Cir. 1994), another case cited by the Supreme Court in *Cooper Industries*). The only other case cited in this vein in *Cooper Industries* is *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997). We simply and respectfully disagree with the Ninth Circuit's holding in *Pinal Creek* that a party that has incurred response costs voluntarily and, if sued, would be held liable under section 107(a), may only bring a contribution claim governed by section 113(f)(1). *See id.* at 1301-06. In particular, *Cooper Industries* is at odds with *Pinal Creek Group's* view that "while § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107." *Id.* at 1302. According to *Cooper Industries*, the two remedies are "clearly distinct." 125 S.Ct. at 582 n.3.

Consequently, we conclude that a party in Con Ed's circumstances may pursue a cost recovery action under section 107(a).

D. Con Ed's Waiver and Failure-to-Plead Arguments

UGI argues that Con Ed cannot pursue any claim other than one under section 113(f)(1) because 1) Con Ed has waived any argument that an alternative provision might support its suit, and 2) Con Ed failed to assert any basis other than section 113(f)(1) in its First Amended Complaint.

As to the first assertion, we have discretion to consider an argument not passed on below where, as here, "'the issue is purely legal and there is no need for additional fact-finding.'" *Baker v. Dorfman*, 239 F.3d 415, 420-21 (2d Cir. 2000) (quoting *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir.1996)). UGI's suggestion that Con Ed waived an

argument supporting subject matter jurisdiction is particularly unpersuasive given that UGI itself declined to press the argument that the court *lacked* subject matter jurisdiction over Con Ed's claim. UGI, in its appellate opposition brief filed on September 10, 2004, mentioned *Cooper Industries,* which was then pending on appeal to the Supreme Court, but "assumed *arguendo*" that the court had subject matter jurisdiction despite Con Ed's not having been sued under section 106 or section 107(a). Apparently hoping that this court would simply affirm the district court summary judgment grant on the merits, UGI attempted to hold its subject matter jurisdiction argument in reserve. However, "[t]he absence of [subject matter] jurisdiction is non-waivable; before deciding any case we are required to assure ourselves that the case is properly within our subject matter jurisdiction." *Wynn v. AC Rochester,* 273 F.3d 153, 157 (2d Cir. 2001). Even after *Cooper Industries* was issued in December of last year, UGI did not submit additional briefing on this topic for a period of more than four months, only advancing its subject matter jurisdiction argument when urged by this court. Having failed to press its argument against subject matter jurisdiction without court prodding, UGI cannot now argue that we should refuse based on waiver to consider an argument *in favor* of jurisdiction.

UGI's second argument also lacks merit. As this court observed in *Albert v. Carovano,* 851 F.2d 561 (2d Cir. 1988), "[t]he failure in a complaint to cite a statute, or to cite the correct one, in no way affects the merits of a claim," because "[f]actual allegations alone are what matters." *Id.* at 571 n.3; *see also Northrop v. Hoffman of Simsbury, Inc.,* 134 F.3d 41, 45-46 (2d Cir. 1997) (citing *Albert*). Here, the First Amended Complaint alleges that Con Ed has incurred and continues to incur cleanup costs, which were incurred voluntarily and not as a result of being held liable under an

administrative or court order or judgment.[14] As we have explained, this suffices for Con Ed to proceed under section 107(a).

CONCLUSION

For these reasons, we conclude that this action arises under CERCLA section 107(a), and that subject matter jurisdiction exists. For the reasons discussed in the accompanying summary order, we affirm in part and reverse in part the district court's grant of summary judgment and remand the case for further proceedings.

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[14] Indeed, the voluntariness of the costs that Con Ed has incurred is demonstrated by the fact that the First Amended Complaint identified these costs, even though it was filed more than six months *before* Con Ed entered into the Voluntary Cleanup Agreement.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 04-2409-CV

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff-Appellant,

v.

UGI UTILITIES, INC.,
Defendant-Appellee.

Sept. 9, 2005

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the city of New York, on the 9th day of September, two thousand and five.

PRESENT: KATZMANN, HALL, *Circuit Judges*, and MURTHA,[1] *District Judge*.

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[1] Hon. J. Garvan Murtha, United States District Judge for the District of Vermont, sitting by designation.

Appeal from the United States District Court for the Southern District of New York (Chin, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said district court be and it hereby is **AFFIRMED** in part and REVERSED in part.

Plaintiff-Appellant Consolidated Edison Company of New York, Inc., ("Con Ed") appeals from a grant of summary judgment to Defendant-Appellee UGI Utilities ("UGI") entered on April 1, 2004 in the United States District Court for the Southern District of New York (Chin, *J.*). Having found in an accompanying opinion that Con Ed's claims arise under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(a), and thus subject matter jurisdiction exists in this matter, we now address the merits. We assume familiarity with the procedural posture of this case and with its facts, which are set forth in detail in the decision of the district court, *Consol. Edison Co. of New York, Inc. v. UGI Utils., Inc.*, 310 F.Supp.2d 592, 596-602 (S.D.N.Y.2004), and in the opinion accompanying this summary order, *Consol. Edison Co. of New York, Inc. v. UGI Utils., Inc.*, No. 04-2409, 2005 WL 2176072 (2d Cir. filed Sept. 9, 2005).

After volunteering to clean up certain of its sites in Westchester County that had been polluted by the operation of manufactured gas plants ("MGPs"), Con Ed brought suit against UGI in 2001 seeking to recover a portion of the cleanup costs.

Con Ed attempts to hold UGI liable, through its corporate predecessors, for the environmental harm at ten MGPs occurring from 1887 to 1904. There are four components of Con Ed's theory of liability. First, Con Ed alleges that between 1887 and 1900 UGI operated three sites in Yonk-

ers—on Woodworth Avenue, Ludlow Street, and Nepperhan Avenue—under three separate leases and was responsible under CERCLA for the environmental harm done there during that period (the "Yonkers Claim"). Second, Con Ed asserts that between approximately 1898 and 1902 UGI was a CERCLA operator of an MGP in Tarrytown and one in White Plains that were owned through UGI subsidiaries (the "White Plains and Tarrytown Claim"). Third, Con Ed asserts that between 1890 and 1900, Con Ed (through its corporate predecessor American Gas) was a CERCLA operator of MGPs in Rye, Mount Vernon, Pelham, Port Chester, and New Rochelle (the "American Gas Claim"). In 1900 or soon thereafter, all of these MGPs were purchased by or merged with the Westchester Lighting Company ("WLC"), a UGI holding company, and this is the basis for the fourth component of Con Ed's liability claim (the "WLC Claim"). Here Con Ed asserts that UGI is liable for the environmental harm at the White Plains and Tarrytown MGPs and the five American Gas MGPs from roughly 1900, when most of them were consolidated under WLC's control, to 1904, when WLC was sold to Con Ed.[2]

UGI moved for summary judgment on all claims, and the district court granted the motion. *Consol. Edison Co. of New York, Inc.*, 310 F.Supp.2d at 602-10. On the Yonkers Claim, the district court concluded that any liability UGI might have had was covered by a general release WLC issued to UGI when WLC purchased the three MGPs and cancelled UGI's

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[2] It is not clear from the proceedings below or arguments on appeal whether Con Ed asserts that from 1900 to 1904 WLC was a CERCLA operator—in addition to the other seven WLC MGPs—of the three Yonkers MGPs, which WLC acquired in 1900 through purchase of three holding companies. To the extent Con Ed does assert such a claim, we conclude that claim must fall to UGI's summary judgment motion for the same reasons we find that summary judgment was proper on the WLC Claim.

operating leases in 1900. *See id.* at 602. The district court also granted summary judgment on the remaining claims--the White Plains and Tarrytown Claim, the American Gas Claim, and the WLC Claim. It concluded that Con Ed had not produced enough evidence to allow a reasonable jury to find that, under the standard for CERCLA operator liability laid out in *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998), UGI was an operator of these MGPs. *Id.* at 602-10.

We review a grant of summary judgment *de novo*. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005). Under section 107(a) of CERCLA, liability attaches to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). Of the two bases for CERCLA liability—owning or operating a facility—it is the second that concerns us here. To be liable as an operator of a facility, the Supreme Court has instructed, a person "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998); *see also Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 332 n. 3 (2d Cir.2000).

In considering whether a parent was an "operator" of a subsidiary's facility, "norms of corporate behavior (undisturbed by any CERCLA provision) are crucial reference points." *Bestfoods*, 524 U.S. at 71, 118 S.Ct. 1876. When such activities are "consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures," *id.* at 72 (quotations and citations omitted), CERCLA operator liability does not arise. The Court also emphasized

that, "[s]ince courts generally presume that the directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary, it cannot be enough to establish liability . . . that dual officers and directors made policy decisions and supervised activities" at the subsidiary's facility. *Id.*at 69-70 (citations omitted).

We conclude, as did the district court, that UGI was entitled to summary judgment on Con Ed's White Plains and Tarrytown Claim, its American Gas Claim, and its WLC Claim, all of which alleged CERCLA operator liability. Largely for the reasons identified by the district court, *Consol. Edison Co. of New York, Inc.*, 310 F.Supp.2d at 606-10, we conclude that Con Ed has pointed to no evidence that would allow a reasonable jury to conclude that UGI "manage [d], direct[ed], or conduct[ed] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67, 118 S.Ct. 1876. Its evidence, in general, consists of (1) overlapping officers and directors between parent and subsidiary, (2) close parental control of the subsidiaries' expenditures, and (3) UGI's enthusiasm for its subsidiaries to use its patented gas machinery. No evidence, however, rebuts the presumption that dual officers and directors can faithfully serve both parent and subsidiary. No evidence is inconsistent with UGI's (or American Gas's) role as an investor in its subsidiaries. In other words, no evidence would allow a reasonable jury to find that the conduct of UGI or American Gas meets the *Bestfoods* standard on these three claims.

On the Yonkers Claim, we disagree with the district court. The three identical releases at issue were each part of cancellations of the lease agreements under which UGI operated the MGPs. Each release stated that the lease agreement was cancelled and that "all claims and demands thereunder . . . by [Con Ed's predecessor] against [UGI] under said agreement

are hereby forever released." In an oral decision, the district court concluded that "it is a general release," but "the language is broad enough to pick up the pollution claim."

We look to state law when interpreting agreements shifting CERCLA liability. *See Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 51 (2d Cir.1993) (interpreting CERCLA indemnification agreement). "New York law requires that a release contain an 'explicit, unequivocal statement of a present promise to release defendant from liability.'" *Bank of Am. Nat'l. Trust & Sav. Ass'n v. Gillaizeau*, 766 F.2d 709, 713 (2d Cir. 1985) (citing *Carpenter v. Machold*, 447 N.Y.S.2d 46, 47 (3d Dep't 1982)). Here, the language of the release is only unequivocal and explicit in releasing claims arising under the lease agreements. Con Ed's claims, however, arise under CERCLA. We cannot conclude that the release was an explicit, unequivocal statement releasing *all* liability, or *contingent* liability, or *environmental* liability. *See John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir.1993) (holding that, based on Massachusetts law, "[t]o transfer CERCLA liability, the Agreement must contain language broad enough to allow us to say that the parties intended to transfer either contingent, environmental liability, or all liability"). Thus, summary judgment was improper.

Accordingly, the judgment of the district court granting summary judgment to UGI is hereby **AFFIRMED** as it relates to the White Plains and Tarrytown Claim, the American Gas Claim, and the White Plains Claim and **REVERSED** as it relates to the Yonkers Claim and **REMANDED** for further proceedings.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: _____

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 8520(DC)

CONSOLIDATED EDISON CO. OF NEW YORK, INC.,
Plaintiff,

v.

UGI UTILITIES, INC.,
Defendant.

March 29, 2004

OPINION

CHIN, *D.J.*

In this case, brought pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, plaintiff Consolidated Edison Company of New York, Inc. ("Con Ed") seeks to hold defendant UGI Utilities, Inc. ("UGI") liable for environmental response costs related to soil and groundwater contamination from manufactured gas plant ("MGP") activities undertaken from 1898 to 1904 at sites owned by a subsidiary and a predecessor of UGI. Defendant moves for summary judgment pursuant to Fed.R.Civ.P. 56. For the reasons set forth below, defendant's motion is granted.

STATEMENT OF THE CASE

I. *The Facts*

For purposes of this motion, the facts are construed in the light most favorable to Con Ed as the party opposing summary judgment.

A. *The Origins of UGI, 1882-1887*

United Gas Improvement Company ("UGIC") was formed in June 1882 by a group of Philadelphia business men for the purpose of "manufacturing gas and gas-making machinery" based on the patent for a "water gas" process and apparatus, obtained in April 1882 from inventor Thaddeus S.C. Lowe. (Def. Exh. 2 at 32, 34-39; Gary Aff., Exh. 4 at UGI 1353; Gary Aff., Exh. 3 at UGI 5332). Lowe water gas was an improvement over coal gas because it produced more light at a lower cost. (Gary Aff., Exh. 4 at UGI 1353). UGIC sought ways to exploit and use this new technology, including by purchasing certain existing gas works, establishing or building new gas works that it would use itself or sell to others, and entering into agreements to operate certain gas plants in return for a share of the profits. (Def. Exh. 2 at 32-33; Def. Exh. 4 at 89; Gary Aff., Exh. 5 at 96).

Under Pennsylvania law, UGIC could not hold stocks in another corporation. (Gary Aff., Exh. 5 at 96). Accordingly, in 1887, the owners of UGIC formed a new company called the Union Company and used it to acquire an old Pennsylvania corporate charter with broad powers that included the right to own other corporations. (Def. Exh. 4 at 89; Gary Aff., Exh. 5 at 96-97). The name of this new company was then changed to *The* United Improvement Company ("TUGIC"). (*Id.*).

B. *UGI Acquisitions in New York, 1888-1900*

TUGIC, which would later become UGI, purchased all of the assets of UGIC in 1888 and then used the charter to acquire gas and electric properties across the United States. (*Id.;* Def. Exh. 3 at 62-67).

UGI[1] acquired ownership interests in the White Plains Lighting Company and Hudson River Gas & Electric Com-

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[1] UGIC, TUGIC, and the currently named UGI are all collectively referred to herein as "UGI," unless otherwise indicated.

pany of Tarrytown in 1898 and 1900, respectively. (Gary Aff., Exh. 29; Exh. 33 at ENV 93, 95; Def. Exh. 9 at 276).

In a January 1900 Board Meeting, UGI President Thomas Dolan reported that UGI had acquired interests in, *inter alia*, New Rochelle Electric Company, Pelham Electric Light and Power Company, Port Chester Electric Light Company, and the White Plains Electric Company. (Def. Exh. 6 at 114). Dolan also reported that UGI had organized a company known as Westchester Gas and Coke Company, which had gas franchises in Mount Vernon and New Rochelle. (*Id.*).

In March 1900, UGI acquired the New York Suburban Gas Company ("New York Suburban") from the American Gas Company ("American Gas") (Def.Exh. 7), itself a consolidation of utility companies owned by American Gas—the Eastchester Gas Light Company, the Pelham Gas Light Company, the Larchmont Gas Company, the Westchester Gas and Electric Company, and the New Rochelle Gas and Fuel Company. (Def.Exh. 8). UGI thereby acquired interests in MGP sites in Mount Vernon, New Rochelle, Pelham, Port Chester, and Rye.

Each company in which UGI invested had a superintendent who oversaw the day-to-day activities of the gas plant. (Macey Dep. at 292-94). UGI developed an audit system pertaining to its various subsidiaries' budgets, expenditures, and best practices. (Def. Exh. 4 at 98).

According to an April 9, 1894 account in the Daily Philadelphia Stockholder describing UGI, each UGI subsidiary

> "should have a separate and independent organization, reporting, however, to the head office in [Philadelphia]. . . . The local superintendents are thus kept in close touch with the home office, and they take no important step which is not specifically authorized. While their instructions are to purchase in the city where each plant is located all needful supplies obtainable there, and thus

> give to each city the benefit of outlays in part incidental with the carrying on of the business, supplies, such as coal, oil, cast iron pipe, etc., are purchased through the home office, in order that here in the East the company may secure the benefit of minimum prices. Attached to the company is a corps of traveling auditors, one of whom visits each local company every three months and makes an examination of its operations and reports thereon to the home office. . . . Not a dollar is outlayed for its account at any point or for any purpose which is not first approved at the home office, and there is the closest scrutiny into each item of expense. . . . Annually there is a convention of superintendents of the local companies, presided over by the general superintendent, at which, besides reports of each as to the operations of the plant or plants under his control, papers are read on practical subjects relating to the objects of the company, etc."

(Gary Aff., Exh. 6 at 2).

C. *Formation and Operation of WLC*

1. *Formation*

In November 1900, UGI organized a new subsidiary to be called the Westchester Lighting Company ("WLC"). (Def. Exh. 10 at CE/UGI 6375). WLC was incorporated for the purpose of "manufacturing and supplying gas for lighting the streets and public and private buildings or cities, villages and towns in the State of New York, and for manufacturing and using electricity for producing light, heat and power. . . ." (Def. Exh. 10 at 281). UGI owned more than 80% of WLC's total shares. (Def. Exh. 11 at 535).

At their first board meeting on November 9, 1900, WLC's nine directors appointed a special committee to "investigate and make inquiry" into the desirability of acquiring the various Westchester gas and electric entities owned by UGI.

(Def. Exh. 11 at 295, 297). The committee, with the help of a gas and electric light business expert, approved the proposed acquisition and merger. (*Id.*).

On November 30, 1900, the WLC board acquired and then merged the companies in which it had obtained interests: the Pelham Electric Light and Power Company, Port Chester Electric Lighting Company, Larchmont Electric Light Company, Eastchester Electric Company, and the Westchester Gas and Coke Company. (Def. Exh. 11 at 307-13). Accordingly, WLC became the owner of MGP sites in Rye, Mount Vernon, Pelham, Port Chester, and New Rochelle.

In February 1901, WLC purchased the Hudson River Gas and Electric Company and the White Plains Lighting Company. (*Id.* at 459-61). In November 1902, WLC merged the companies into WLC. (*Id.*). WLC thus became the owner of MGP sites in Tarrytown and White Plains.

2. *Operations*

a. *Board of Directors*

Upon WLC's creation in 1900, none of the first nine men listed in the WLC Certificate of Incorporation and selected to serve on WLC's board were dual office-holders. (Def. Exh. 11 at 289; Def Exh. 12 at 724). At no time during 1900 to 1904 did UGI directors, officers, or employees constitute a majority of the directors or officers of WLC. (Def. Exh. 12 at 724-25).

During the first months of the WLC board's existence, the directors appointed an executive committee to help manage the company, elected its president who would serve for the next four years, and reviewed the strength of each constituency company before effecting the large-scale merger. (Def. Exh. 11 at 296-301, 446).

In 1901, three of the nine WLC directors held UGI senior executive positions. (Def. Exh. 12 at 724). Two of the

other board members—A.M. Young and R.A.C. Smith—had worked "in conjunction" with UGI to acquire possession of the New Rochelle Electric Company, Pelham Electric Light and Power Company, Port Chester Electric Light Company, Larchmont Electric Light Company, Eastchester Electric Company, and White Plains Electric Company. (Def. Exh. 6 at 114; Exh. 11 at 446-47).

In 1902 and 1903, four of the eleven WLC directors held UGI senior executive positions. (*Id.*). In 1904, four, then five, of eleven directors held UGI senior executive positions. (*Id.*).

From 1900 to 1904, UGI senior executives never held the positions of WLC president, vice president, or secretary. (*Id.*). UGI executives did hold positions as WLC treasurer, assistant secretary, and managing director. (*Id.*). Specifically, UGI's treasurer Lewis Lillie was elected to assistant secretary and treasurer of WLC. (Def. Exh. 11 at CE/UGI 12469, 19079). UGI's general superintendent Walton Clark was named WLC managing director. (*Id.* at CE/UGI 19078).

The managing director "shall have the general management of the business and properties of the company, and shall perform such other duties as may be imposed upon him by the board of directors." (Def. Exh. 11 at CE/UGI 12387). According to the WLC bylaws, the duties of WLC's president included "presid [ing] at all meetings of the board of directors," "act[ing] as temporary chairman at and call[ing] to order all meetings of the stockholders," "countersign[ing] all checks, and . . . sign[ing] drafts, notes, certificates of stock, and all contracts and other instruments, unless otherwise ordered by the board." (Def. Exh. 11 at CE/UGI 12385). The president also "shall, under the control of the directors, have the general management of the company's affairs, and shall perform all duties incidental to his office." (*Id.*).

b. *WLC Executive Committee*

In January 1901, the WLC board of directors appointed an "executive committee," which was "in the recess of the Board [to] have full power to direct and manage the business affairs of the company in such manner as such committee shall deem best for the interests of the company in all cases in which specific directions have not been given by the Board." (Def. Exh. 11 at 446). The committee consisted of four members of the WLC board with the WLC president W.W. Scrugman serving in an ex-officio capacity. (*Id.*). Lillie, both UGI's treasurer and WLC's assistant secretary and treasurer, and Clark, UGI's general superintendent and WLC's managing director, filled two of the five executive committee positions. (Def. Exh. 11 at 447). The other positions were filled by board members who were local businessmen but did not hold management positions at WLC. (*Id.*).

According to the WLC Executive Committee minutes for 1900 to 1903 WLC made decisions concerning setting salaries (Def. Exh. 17 at 757-58), approving the sale of various used equipment and materials (*id.* at 788), approving contracts and expenditures for improvements and repairs (*id.* at 753), authorizing changes in gas and electric rates and rate reductions (*id.* at 742, 750-52, 839), setting electric current rates (*id.* at 758), approving the purchase of electric franchises (*id.* at 755), approving the execution of leases (*id.* at 809), and appointing an attorney for legal services. (*Id.* at 887).

In January 1901, UGI was named purchasing agent and consulting engineer for WLC. (Def. Exh. 11 at CE/UGI 19076).

c. *Superintendents of WLC Facilities*

Each of the WLC facilities was directed by its own superintendent. (Def. Exh. 17 at 757). According to expert

testimony, "the superintendent . . . generally runs the facility." (Macey Dep. at 294).

d. *UGI Managing Committee and Works Committee*

From 1900 to 1903, UGI had a Managing Committee and a Committee on Works ("Works Committee"), which worked together to monitor UGI's investments and to ensure that extensions, property improvements, and certain supply contracts were reviewed and that UGI's subsidiaries received UGI's expert advice when needed. (Def. Exh. 4 at 97-98). In 1903, UGI president Thomas Dolan described UGI's management of the subsidiaries, stating that "the Works Committee of [UGI] passes favorably upon all property improvements and extensions, and contracts for supplies, before they are authorized. This Committee meets every day." (Gary Aff., Exh. 4 at UGI 1488). UGI's corporate history indicates that the Works Committee consisted of top UGI executives—President Dolan, Vice President and General Manager Samuel Bodine, Vice President and General Counsel Randal Morgan, General Superintendent Walton Clark, and Treasurer Louis Lillie. (Def. Exh. 4 at UGI 1488-89). In 1904, both the managing and works committees were abolished in favor of a single executive committee. (Def. Exh. 18 at 1061).

e. *UGI Advice to WLC*

A May 4, 1903 letter to UGI shareholders from UGI president Dolan stated that UGI provided "advice" to the companies in which UGI held interests "in the purchase of supplies, in laying out, construction and operation of plants, in solving legal and financial problems, in canvassing for new business and in all the details which make for success in the management of a manufacturing company selling its wares to an entire community." (Def. Exh. 4 at UGI 1489). UGI offered its "advice," in part, through the annual meeting of "the Superintendents and the Commercial Agents of all the companies . . . in [Philadelphia, UGI's headquarters,] . . . to

read and discuss carefully prepared papers upon the various technical and commercial problems of the business in which they are engaged." (*Id.*).

f. *Macey Expert Report*

Con Ed's corporate governance expert Jonathan Macey concludes that "UGI controlled every material aspect of the operations of [WLC]" and "controlled all of the important facets of its policies and operations, down to the smallest details." (Def. Exh. 1 at 2). Macey further states that UGI "controlled every aspect of the corporate existence of [WLC] from its birth to its corporate death." (*Id.* at 6). Macey points, as illustration, to the UGI executive committee's approval throughout 1904 of WLC actions, including employment decisions, contracts for coal, sales of property, and purchases of equipment for the MGPs. (*Id.* at 6-9).

3. *Con Ed's Purchase of WLC*

On July 1, 1904, Con Ed entered into an agreement with UGI to purchase its ownership interest in WLC. (Def. Exh. 20). The WLC board of directors authorized the transaction on July 8, 1904. (Def. Exh. 11 at 533-624). The agreement was consummated on October 20, 1904 when WLC's stockholders and board of directors granted authorization for WLC to transfer all of its rights and property to a new Con Ed subsidiary known as the New York and Westchester Lighting Company. (Def. Exh. 11). That same day, New York and Westchester Lighting Company merged into WLC (*Id.* at 682-83), and Con Ed controlled WLC, with whom it eventually merged in 1951. (Def. Exh. 21).

E. *American Gas's Operations, 1890-1900*

Prior to UGI's purchase of New York Suburban from American Gas in March 1900, American Gas owned the MGP sites in Mount Vernon, New Rochelle, Pelham, Port Chester, and Rye. Con Ed alleges that American Gas incurred

CERCLA liability through its control over its Westchester County subsidiaries from 1890 to 1900 and that UGI succeeded to this liability when American Gas merged into UGI in 1925. (Pl.Surr.1).

1. *Dual Officers/Directors*

American Gas installed its own corporate officers and directors as officers and directors of its Westchester County subsidiaries. (Gary Aff., Exh. 22 at UGI 5-6; Exh. 17 at ENV 22, 24, 25; Exh. 23 at CE/UGI 27296; Exh. 24 at CE/UGI 12361; Def. Exh. 8). In the December 16, 1891 American Gas Board minutes, American Gas's Solicitor Thomas Leaming described the annual meeting of Eastchester Gas Company ("Eastchester Gas"), which owned the Mount Vernon MGP:

> [T]he General Manager, Treasurer and myself went to New York, held the annual meeting of the company, adopted a simple form of by-laws, elected directors, and afterward held a board meeting and elected officers. Messrs. Carpender, Penford, and Crawley were made the New York directors with Messrs. [Ramsdale] and Stroud. Mr. Carpender was elected President, Mr. [Ramsdale] General Manager, and Mr. Stroud Treasurer and Sec'y.

(Gary Aff., dated Nov. 24, 2003, Exh. 1 at UGI 7073). Carpender was American Gas's president. Penford and Crawley were Carpender's law firm partners and served on American Gas's board of directors. Ramsdale was American Gas's general manager. Stroud was American Gas's treasurer. (Pl. Surr. 2).

2. *Observance of Corporate Separateness*

Plaintiff alleges that American Gas failed to observe "corporate separateness." (Pl. Surr. 3). According to the October 26, 1893 minutes, American Gas's general manager

Ramsdale, as general manager of the New Rochelle subsidiary, had entered into a construction contract listing himself as general manager of American Gas, "the contract showing of course, a profit to the latter company, and he is thus acting in a double capacity." (Gary Aff., dated Nov. 23, 2003, Exh. 1 at UGI 7207). The contract was subsequently approved by the subsidiary's board of directors and signed on behalf of the company by its president. (*Id.*).

3. *American Gas's Subsidiary Operations*

American Gas's board of directors approved decisions pertaining to the subsidiaries' management, including equipment purchases for the MGPs, formation of contracts, and property extensions. (*Id.*, Exh. 25 at UGI 756).

American Gas's general manager Ramsdale served as the general manager for all of the Westchester subsidiaries. (Gary Aff., Exh. 23 at CE/UGI 27296; Exh. 25). The superintendent of each MGP reported to Ramsdale and obtained his approval before taking any action. (*Id.*, Exh. 23 at CE/UGI 27286-87; Exh. 24 at CE/UGI 12360). Ramsdale regularly visited each MGP to monitor its operations. (*Id.*, Exh. 25 at UGI 744-45).

According to the June 17, 1891 American Gas board minutes, the company approved the purchase and erection of a purifier plant at Eastchester Gas Company's Mount Vernon MGP. (Gary Aff., dated Nov. 24, 2003, Exh. 1 at UGI 7044). According to the April 20, 1892 and May 18, 1892 minutes, American Gas approved the purchase and installation of a new water gas plant from UGI for the Mount Vernon MGP. (*Id.*, Exh. 1 at UGI 7104-06). In the April 5, 1892 minutes, American Gas's management referred to the Mount Vernon MPG as "works operated by [American Gas]." (*Id.*, Exh. 1, at UGI 7090).

According to the November 15, 1893 minutes, American Gas decided to reduce the amount of insurance held on the

New Rochelle Gas Company's MGP in New Rochelle. (*Id.*, Exh. 1 at UGI 7211). The February 21, 1894 minutes state that American Gas approved the replacement of the gas manufacturing apparatus at the New Rochelle MGP with parts from another American Gas MGP plant. (*Id.*, Exh. 1 at UGI 7226-27). According to the May 18, 1892 minutes, American Gas "assumed control of the operations of the plant [at New Rochelle], . . . and made very considerable change." (*Id.*, Exh. 1 at UGI 7106). Specifically, American Gas made changes to the plant's oil purchasing agreement. (*Id.*).

4. *American Gas's Merger into UGI in 1925*

American Gas merged into UGI in 1925, leaving UGI as the surviving company. (Gary Aff., Exh. 21). The "Agreement of Consolidation and Merger" stated that UGI and American Gas became "one corporation under the name [UGI] . . . possessing all of the rights, privileges and franchises theretofore vested in each of them" and "all debts not of record, duties and liabilities of each of said constituent corporations shall thenceforth attach to the consolidated corporation, and may be enforced against it." (*Id.*, Exh. 21 at UGI 6976).

F. *Environmental Contamination*

According to Con Ed's environmental expert, Robert M. Karls, the contamination at the Rye, Mount Vernon, Pelham, and Port Chester MGPs was caused by the releases from "routine operations" at those facilities occurring during the intervals from the installation of MGP equipment through the end of gas production at those sites. (Gary Aff., Exh. 30 at 12, 14, 20, 24).

Con Ed has performed no environmental testing at the MGP sites in New Rochelle, Rye, and Mount Vernon. (Wilcken Dep. at 67-68, 115, 128, 188). The extent of contamination has not been determined at the White Plains site. (*Id.* at 150-52). Con Ed has been or will be contributing

to cleanups being performed by successor owners at Port Chester and Pelham and has conveyed the MGP site and agreed to pay a fixed sum for environmental liabilities at Tarrytown. (*Id.* at 92-94, 159-60, 219). Pursuant to a Voluntary Cleanup Agreement with the New York State Department of Environmental Conservation ("NYSDEC"), Con Ed is required to investigate and remediate all of its former MGP sites, including those at issue in this action. (Gary Aff., Exhs. 31, 32). In complying with the Agreement, Con Ed has spent more than $4 million to investigate and clean up the MGP sites at issue. (Wilcken Aff. ¶ 3). Con Ed expects to expend in excess of $100 million to complete the investigation and remediation of all of the MGP sites at issue. (*Id.* ¶ 4).

II. *Prior Proceedings*

Con Ed filed the original complaint in this action on September 20, 2001. Con Ed filed an amended complaint on March 4, 2002. After discovery, UGI moved for summary judgment pursuant to Fed.R.Civ.P. 56. The Court heard oral argument on the motion for summary judgment on November 25, 2003. Ruling from the bench, the Court granted the motion in part and reserved decision in part. The Court dismissed all derivative liability claims, predicated on piercing the corporate veil, including the state law claims, and all claims with respect to the Yonkers MGP sites. (Tr. 47-48). The Court reserved decision as to the remaining operator liability claims with respect to the other seven sites. (*Id.* 48).

DISCUSSION

I. *Applicable Law*

A. *Summary Judgment Standard*

Summary judgment will be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.

56(c); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). Accordingly, the Court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Summary judgment is inappropriate if, resolving all ambiguities and drawing all inferences against the moving party, there exists a dispute about a material fact "such that a reasonable jury could return a verdict for the nonmoving party." *Id.* 477 U.S. at 248, 106 S.Ct. 2505; *see Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 116 (2d Cir. 1991). A factual issue is genuine if it can reasonably be resolved in favor of either party. *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505. A fact is material if it can affect the outcome of the action based on the governing law. *Id.* at 248.

The party seeking summary judgment must demonstrate the absence of genuine issues of material fact, and then the nonmoving party must set forth facts proving that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-24 (1986). To defeat a motion for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The nonmoving party "must present concrete particulars and cannot succeed with purely conclusory allegations." *Fitch v. R.J. Reynolds Tobacco Co.*, 675 F.Supp. 133, 136 (S.D.N.Y.1987) (internal quotations omitted). There is no issue for trial unless there exists sufficient evidence in the record favoring the party opposing summary judgment to support a jury verdict in that party's favor. *Anderson*, 477 U.S. at 249-50. As the Court held in *Anderson*, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* (citations omitted). The plaintiff must provide the Court with some basis to believe that her "version of relevant events is not fanciful." *Christian Dior-New York, Inc. v. Koret, Inc.*, 792 F.2d 34, 38 (2d Cir. 1986) (internal quotations omitted).

B. *Operator Liability Pursuant to CERCLA*

Liability under CERCLA attaches, *inter alia*, to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). An "operator" is "any person . . . operating" the relevant facility. 42 U.S.C. § 9601(20)(A)(ii).[2] "[U]nder CERCLA, an operator is simply someone who directs the working of, manages, or conducts the affairs of a facility." *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998).

CERCLA operator liability, however, requires that the operator's control over the facility relate to pollution control or waste disposal. "To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67; *see also Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 332 n.3 (2d Cir. 2000) (in holding that operator liability did not apply, noting that, under facts, defendant could not be said to have "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations") (quoting *Bestfoods*, 524

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[2] "Person" is defined in CERCLA to include corporations and other business organizations. 42 U.S.C. § 9601(21). "Facility" means: "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." 42 U.S.C. § 9601(9).

U.S. at 66-67); *United States v. Green*, 33 F. Supp. 2d 203, 217 (W.D.N.Y. 1998) (holding that defendant could not be found liable as an operator because of absence of evidence that he directly participated in the management of facility's pollution control operations, including decisions pertaining to the disposal of hazardous substances and compliance with environmental regulations).

Derivative liability cases, which are based on piercing the corporate veil, are distinct from operator liability cases, in which the parent's liability is direct. "[D]erivative liability cases are to be distinguished from those in which 'the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management' and 'the parent is directly a participant in the wrong complained of.' . . . In such instances, the parent is directly liable for its own actions." *Bestfoods*, 524 U.S. at 64-66, 118 S.Ct. 1876 (quoting Douglas & Shanks, Insulation from Liability Through Subsidiary Corporations, 39 Yale L.J. 193, 207, 208 (1929)). "CERCLA's 'operator' provision is concerned primarily with direct liability for one's own actions." *Id.* at 65. "If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to the issue of direct liability." *Id.*

Prior to *Bestfoods*, some circuits applied the "actual control" test to determine operator liability, looking to "whether the parent 'actually operated the business of its subsidiary.'" *Id.* at 68, ((citing *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (operator liability "requires active involvement in the affairs of the subsidiary"); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993) (parent is liable if it "actually exercised control over, or was otherwise intimately involved in the operations of, the [subsidiary] corporation immediately responsible for the

operation of the facility")); *see also City of New York v. Exxon Corp.*, 112 B.R. 540, 548 n.9 (S.D.N.Y.1990) ("We believe that some degree of active participation in and actual control over the affairs of the subsidiary is necessary"); *cf. State of Idaho v. Bunker Hill Co.*, 635 F.Supp. 665, 672 (D. Idaho 1986) (determining whether owner or operator liability applied based on whether defendant had "capacity" to prevent and abate environmental damage). Morever, some courts have referred to "owner or operator liability" as one form of liability, implying the interchangeability of these two distinct bases. *See, e.g., Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990); *Bunker Hill,* 635 F.Supp. at 672.

The Court in *Bestfoods* held, however, that the "actual control" test wrongly combines direct and indirect liability. *Id.* at 67. "'The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary. Control of the subsidiary, if extensive enough, gives rise to indirect liability under piercing doctrine, not direct liability under the statutory language.'" *Id.* at 68, 118 S.Ct. 1876 (citing Lynda J. Oswald, Bifurcation of the Owner and Operator Analysis under CERCLA, 72 Wash. U. L.Q. 223, 269 (1994)) and *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996) ("Any liabilities [the parent] may have as an operator, then, stem directly from its control over the plant").

The Supreme Court in *Bestfoods* contemplated three scenarios in which operator liability might arise, based on a parent company's direct pollution-related action vis-à-vis a facility. 524 U.S. at 71. First, a parent might be held directly liable when "the parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of joint venture." *Id.*

Second, direct liability might arise when "a dual officer or director . . . depart[s] so far from the norms of parental

influence exercised through dual officeholding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility." *Id.* Evidence of common directors or officers between a parent and its subsidiary, however, is insufficient on its own to expose the parent to direct liability under CERCLA. *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 57 (2d Cir.), *cert. denied*, 488 U.S. 852 (1988); *see also Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); *Bestfoods*, 524 U.S. at 69, 118 S.Ct. 1876. Courts generally presume that directors "are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary." *Bestfoods*, 524 U.S. at 69 (citing P. Blumberg, Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations § 1.02.1, p. 12 (1983)); *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 485 U.S. 1014 (1986)). To establish liability, a plaintiff seeking to establish a parent's liability based on common directors or officers must demonstrate that, despite the general presumption to the contrary, the officers and directors "were acting in their capacities as [the parent's] officers and directors, not as [the subsidiary's] officers and directors, when they [made policy decisions and supervised activities at the facility]." *Id.* at 70, 118 S.Ct. 1876; *see also Raytheon Constructors, Inc. v. Asarco, Inc.*, No. 00-1500, 00-1530, 2003 WL 984623, at *4 (10th Cir. Mar. 11, 2003) (holding that fact that shareholder's president acted as president and board member of subsidiary company was insufficient for operator liability in absence of evidence that action was taken in capacity other than as president and board member of subsidiary).[3]

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[3] The Court in *Bestfoods* elaborated on this point to highlight the distinction between derivative and direct CERCLA liability:

> Indeed, if the evidence of common corporate personnel acting at management and directorial levels were enough to support a finding

Third, the Court contemplated direct liability when "an agent of the parent with no hat to wear but the parent's hat . . . manage[s] or direct[s] activities at the facility." *Id.* at 71. "[T]he acts of direct operation that give rise to parental liability must necessarily be distinguished from the interference that stems from the normal relationship between parent and subsidiary. Again, norms of corporate behavior (undisturbed by any CERCLA provision) are crucial reference points." *Id.* at 71-72. "The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility." *Id.* at 72. "Norms of corporate behavior" are relevant to distinguishing "a parental officer's oversight of a subsidiary from such an officer's control over the operation of the subsidiary's facility." *Id.* at 71-72.

> '[A]ctivities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability.'

Id. at 72 (quoting Oswald, *supra,* at 282).

C. *Successor Liability Under CERCLA*

Under common law, a corporation acquiring the assets of another corporation only takes on its CERCLA liabilities if any of the following apply: (1) "the successor expressly or impliedly agrees to assume them"; (2) "the transaction may be viewed as a de facto merger or consolidation"; (3) "the

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of a parent corporation's direct operator liability under CERCLA, then the possibility of resort to veil piercing to establish indirect, derivative liability for the subsidiary's violations would be academic.

524 U.S. at 70.

successor is the 'mere continuation' of the predecessor"; or (4) "the transaction is fraudulent." *State of New York v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682, 685 (2d Cir. 2003) (quoting *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996)); *see also Pfohl Bros. Landfill Site Steering Committee v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134, 162 (W.D.N.Y. 2003).

II. *Application*

The remaining claims in this action are the CERCLA and declaratory judgment claims pertaining to the seven non-Yonkers MGPs located in Rye, Mount Vernon, Pelham, Port Chester, New Rochelle, White Plains, and Tarrytown. Con Ed seeks relief contribution for response costs for operator liability, pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f)(1). In addition, Con Ed seeks a declaratory judgment, pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) and 28 U.S.C. § 2201, as to UGI's liability pursuant to Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1).

Con Ed asserts three theories of liability. First, it alleges that, when American Gas merged into UGI in 1925, UGI succeeded to American Gas's CERCLA liabilities incurred through the latter's ownership and operation of five of the seven MGP sites at Rye, Mount Vernon, Pelham, Port Chester, and New Rochelle prior to the sale of the property to UGI in March 1900. (Pl.Mem. 32-33). Second, it alleges that operator liability attaches based on UGI's "direct control" over the management of its subsidiaries and the operations of all seven MGPs from 1900 to 1904. (Pl. Mem.28). Third, although styled as owner liability, plaintiff appears to assert operator liability based on UGI's alleged domination and control over the management and operations of the White Plains and Tarrytown MGPs from 1898 and 1900, respectively, until 1902, when White Plains Lighting and Hudson River Gas merged into WLC. (Pl. Mem.36-37).

A. *UGI's Successor Liability For Rye, Mount Vernon, Pelham, Port Chester, and New Rochelle Based on American Gas Ownership from 1890 to 1900*

Con Ed alleges that when American Gas merged into UGI in 1925, UGI succeeded to the CERCLA liability American Gas incurred when it owned and operated the MGP sites at Rye, Mount Vernon, Pelham, Port Chester, and New Rochelle from 1890 to 1900. (Pl. Mem. 32-33; Pl. Surr. 1).

Con Ed's argument assumes that American Gas incurred CERCLA liability based on its ownership of the MGP sites prior to 1900. Con Ed relies primarily on American Gas board minutes from 1890 to 1900 to establish that American Gas's control over the Mount Vernon and New Rochelle MGPs and their operations gave rise to operator liability based on the existence of dual officers and directors, the absence of corporate separateness, and American Gas's control over the MGP operations. Because I have already dismissed all claims predicated on derivative liability, I examine whether any factual issues exist pertaining to American Gas's direct liability as an operator.

Con Ed offers the following as evidence of American Gas's liability. Corporate decisions for the Westchester subsidiaries were made by American Gas from its offices in Philadelphia. (Gary Aff., Exh. 25). American Gas's board of directors approved decisions pertaining to the subsidiaries' management, including requests for approval of equipment purchases for the MGPs, formation of contracts, and property extensions. (*Id.*, Exh. 25 at UGI 756).

American Gas's general manager served as the general manager for all of American Gas's Westchester subsidiaries. (Gary Aff., Exh. 23 at CE/UGI 27296). The superintendent of each MGP reported to American Gas's general manager and obtained his approval before taking any action. (*Id.*, at Exh. 23 at CE/UGI 27286-87; Exh. 24 at CE/UGI 12360).

American Gas installed its own corporate officers and directors as officers and directors of its Westchester County subsidiaries. (Gary Aff., Exh. 22 at UGI 5-6; Exh. 17 at ENV 22, 24, 25; Exh. 23 at CE/UGI 27296; Exh. 24 at CE/UGI 12361; Def. Exh. 8).

In addition, American Gas approved the purchase and erection of a purifier plant at the Mount Vernon MGP and the purchase and installation of a new water gas plant for the Mount Vernon MGP. (*Id.* at UGI 7044, 7104-06). In the April 5, 1892 minutes, American Gas's management referred to the Mount Vernon MGP as "works operated by [American Gas]." (*Id.* at UGI 7090).

American Gas approved the reduction of insurance on the New Rochelle MGP and the replacement of the gas manufacturing apparatus at the New Rochelle MGP with parts from another American Gas MGP plant. (*Id.* at 7211, 7226-27). Moreover, the minutes establish that American Gas's general manager Ramsdale, who was also the New Rochelle subsidiary's general manager, entered into a construction contract, later authorized by the subsidiary's board of directors and signed by its president, showing a profit to American Gas. (*Id.* at UGI 7207). According to the minutes, American Gas assumed "control over the operations" of the New Rochelle MGP, which included changes American Gas made to the MGP's oil purchasing agreement. (*Id.* at UGI 7106).

Based on the evidence submitted, a reasonable jury could only conclude that American Gas is not directly liable as an operator of the MGPs owned by its subsidiaries. First and most importantly, the record is devoid of any evidence of American Gas's control over "operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67; *Commander Oil*, 215 F.3d at 332 n.3; *Green*, 33 F. Supp. 2d at 217-18. Second, much of the evidence

submitted pertains to the relationship between American Gas and its subsidiaries, which is largely irrelevant to the inquiry into whether American Gas is directly liable as an operator of the MGPs. *Bestfoods*, 524 U.S. at 65. Third, evidence of overlapping corporate management is insufficient, on its own, to establish direct liability. *American Protein Corp.*, 844 F.2d at 57; *Kingston Dry Dock Co.*, 31 F.2d at 267; *Bestfoods*, 524 U.S. at 69; *Raytheon*, 2003 WL 984623, at *4. Con Ed has failed to provide evidence to overcome the presumption that the shared officers and directors acted on behalf of the subsidiaries. *Bestfoods*, 524 U.S. at 70. Evidence of the construction contract favorable to American Gas, entered into by Ramsdale, fails to overcome the presumption that he acted on the subsidiary's behalf because the contract was subsequently approved by the subsidiary's board of directors and signed on behalf of the company by its president. (Gary Aff., dated Nov. 23, 2003, Exh. 1 at UGI 7207).

In the absence of American Gas's operator liability, no reasonable jury could conclude that UGI was liable as a successor when American Gas merged into UGI in 1925. Accordingly, UGI's motion for summary judgment is granted as to Con Ed's successor liability claim.

B. *UGI's Operator Liability Based On Control Over WLC and MGP Operations at Mount Vernon, New Rochelle, Pelham, Port Chester, Rye, Tarrytown, and White Plains from 1900 to 1904*

Plaintiff alleges that UGI exerted direct control over WLC and the operation of the seven MGPs owned by WLC, giving rise to operator liability based on conduct from 1900 to 1904. These MGPs are located in Mount Vernon, New Rochelle, Pelham, Port Chester, Rye, Tarrytown, and White Plains.[4]

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[4] WLC owned the MGPs at Tarrytown and White Plains from 1902 to 1904.

Con Ed's allegations in support of its WLC-based operator liability claim fall into two general categories. First, Con Ed alleges that several UGI officers and directors also served in management and directorship roles vis-à-vis WLC. For example, Con Ed asserts that UGI officers Louis Lillie and Walton Clark served as WLC's treasurer, assistant secretary, and managing director. (Pl. Mem. 27-28). Pursuant to WLC's bylaws, Clark, as WLC's managing director, was responsible for and directed the "general management of the business properties" of WLC, including the management of the gas operations. (*Id.*). Lillie and Clark also comprised half of WLC's executive committee. (*Id.*). In addition, Lillie, Clark, and UGI employees Randal Morgan and George Philler served on WLC's board of directors. (*Id.*).

In support of its claim that UGI controlled the management and operations of WLC, Con Ed also asserts that WLC did not act or make any expenditures without UGI's approval and that UGI was appointed both the purchasing agent and consulting engineer for WLC. (*Id.;* Def. Exh. 1 at 6). Con Ed also alleges that Robert Searle, "a known UGI employee," was involved in gas operations for WLC and that UGI paid the salaries of certain alleged WLC employees. (*Id.*; Gary Aff., Exh. 18 at ENV 43).

Con Ed's allegations of dual officership and directorship are insufficient as a matter of law to establish operator liability. Lillie's and Walton's dual roles as UGI officers and WLC directors, officers, and executive committee members do not, without more, overcome the presumption that they were acting on behalf of WLC. *Bestfoods*; *American Protein Corp.*, 844 F.2d at 57; *Kingston Dry Dock Co.*, 31 F.2d at 267; *Raytheon*, 2003 WL 984623, at *4. The mere fact of Walton's dual role as a UGI officer and WLC's managing director does not mean, as a matter of law, that Walton acted on UGI's behalf. Con Ed fails to offer any evidence that either Lillie or Walton departed so far from "the norms of

parental influence . . . as to serve the parent." *Bestfoods*, 524 U.S. at 71. In fact, Con Ed fails to provide any evidence at all to illustrate the nature of Lillie's and Walton's conduct.

Con Ed's evidence of UGI's control over the management and operations of MGPs is also insufficient as a matter of law. First, UGI's approval of WLC expenditures falls within the parameters of the parent-subsidiary relationship. *See Bestfoods*, 524 U.S. at 72 (stating that supervision of subsidiary's finance and capital budget decisions does not qualify as parent's control of facility's operation); *Schiavone v. Pearce*, 77 F. Supp. 2d 284, 290 (D. Conn. 1999) (holding that evidence of interlocking board of directors examining and approving capital expenditures, including those for pollution control equipment, was consistent with typical relationship between parent and subsidiary); *cf. Datron, Inc. v. CRA Holdings, Inc.*, 42 F. Supp. 2d 736, 747 (W.D.Mich.1999) (holding that requirement for subsidiary to obtain parent's approval for credit arrangements beyond normal commercial credit accounts fell within norms of parental oversight).

Second, evidence that UGI was appointed both the purchasing agent and consulting engineer for WLC is also insufficient as a matter of law to establish UGI's control as an operator. Con Ed conclusorily alleges that, in these capacities, UGI "determined the vendors, products, and processes which would be used at the MGPs." (Pl. Opp. 38). The record lacks evidence, however, supporting this general description of the consulting engineer function. Moreover, any evidence that might support Con Ed's assertion would still be insufficient as a matter of law to establish liability. Corporate decision-making of the type attributed to the consulting engineer function would fall within the contours of parental oversight. *See Bestfoods*, 524 U.S. at 72 (stating that parent's determination of policies and procedures was consistent with parent's investor status); *Schiavone*, 77 F. Supp. 2d at 292 (holding that parent's control over subsid-

iary's contract review, approval, and negotiation and capital expenditures comported with normal parental oversight); *Datron*, 42 F. Supp. 2d at 748 (holding that parent's establishment of corporate policies applicable to subsidiary was consistent with parent's investor status). UGI's role as WLC's purchasing agent is similarly consistent with UGI's investor status. *See id.*

Con Ed's allegation that Robert Searle, "a known UGI employee," was involved in gas operations for WLC is equally insufficient as a matter of law to establish liability. UGI, in fact, disputes Con Ed's assertion that Searle was a UGI employee, contending that Searle was never employed by UGI and was instead an employee of New York Suburban, the company UGI acquired from American Gas in March 1900. (Def. Reply 4 (citing Gary Aff., Exh. 18 at ENV 43)). Even assuming that Searle was a UGI employee, his alleged "involve[ment] in gas operations for WLC" does not amount to direct control over the MGP facilities, let alone control over the pollution and waste disposal-related activities at the sites. At best, Con Ed's allegation speaks to UGI's relationship with WLC, which is an inadequate basis for operator liability.

Lastly, Con Ed contends that UGI's payment of the salaries of certain alleged WLC employees supports its operator liability claim. According to the WLC executive committee minutes from September 18, 1902, the committee approved the salary for engineer J.A. Perry to be paid by WLC and UGI. (Def. Exh. 17 at UGI 25643-44). UGI's payment to Perry does not, however, establish that UGI controlled the operations of the MGPs. At best, it illustrates the relationship between UGI and Con Ed.

The evidence offered by Con Ed to support its WLC-based claim fails to raise an issue of fact as to whether UGI directly controlled the operations at the MGPs owned by WLC from 1900 to 1904. Moreover, the record is devoid of evidence

establishing that UGI engaged in pollution or waste disposal activity at the MGPs. The mere suggestion that pollution or waste disposal operations may have been implicated in UGI's relationship with WLC does not create an issue of fact as to UGI's operator liability. Based on the evidence submitted, no reasonable jury could conclude that UGI is subject to operator liability for activity from 1900 to 1904 at the MGPs located in Mount Vernon, New Rochelle, Pelham, Port Chester, Rye, Tarrytown, and White Plains. UGI's motion for summary judgment is granted as to this claim.

C. *UGI's Operator Liability for Tarrytown and White Plains MGPs from 1898 to 1902*

Con Ed contends that UGI is liable as an operator of the White Plains and Tarrytown MGPs based on UGI's control over the subsidiaries that owned these sites from 1898 until the subsidiaries merged into WLC in 1902. (Pl.Mem.36). UGI acquired ownership interests in the White Plains Lighting Company in 1898 and the Hudson River Gas and Electric Company of Tarrytown in 1900. (Gary Aff., Exh. 29; Exh. 33 at ENV 93, 95). Con Ed bases its operator liability claim on allegations that UGI and these two subsidiaries shared officers and directors and that UGI controlled these subsidiary's operations. (Pl.Mem.36-38).

The record, however, is devoid of evidence showing that UGI directly operated the White Plains and Tarrytown MGPs from 1898 to 1902. Con Ed merely makes the conclusory statement that "UGI dominated and controlled the management and operations of the White Plains Lighting and Hudson River Gas companies prior to their merger into WLC." (Pl.Mem.36). Moreover, Con Ed fails to submit evidence establishing UGI's control over the MGPs' pollution control or waste disposal activities. Lastly, to the extent that UGI and its White Plains and Tarrytown subsidiaries shared officers and directors, Con Ed fails to offer evidence to overcome the presumption that the officers and directors

acted on the subsidiaries' behalf. *See Bestfoods*, 524 U.S. at 69-70; *American Protein Corp.*, 844 F.2d at 57; *Kingston Dry Dock Co.*, 31 F.2d at 267; *Raytheon*, 2003 WL 984623, at *4.

A reasonable jury could only conclude, based on the evidence presented, that UGI was not directly liable for activities at the Tarrytown and White Plains sites from 1898 to 1902. Accordingly, UGI's motion is granted as to this claim.

CONCLUSION

For the reasons set forth above, the motion is granted in its entirety and the complaint is dismissed with prejudice and with costs. The Clerk of the Court shall enter judgment accordingly.

SO ORDERED.

Dated: New York, New York
March 29, 2004

/s/ _____
Denny Chin
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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01 CV 8520 (DC)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff,
v.
UGI UTILITIES, INC.,
Defendant.

November 25, 2003 11:00 a.m.
Before: HON. DENNY CHIN, District Judge

APPEARANCES

DICKSTEIN SHAPIRO MORIN & OSHINSKY
Attorneys for Plaintiff
BY: DAVID ELKIND
KEISHA GARY

FOLEY & LARDNER
Attorneys for Defendant
BY: JAY VARON
JESSICA JONES

[2] (Case called)

(In open court)

THE COURT: Good morning. Please be seated.

MR. ELKIND: Good morning.

MR. VARON: Good morning.

THE COURT: Okay. I have read the papers. Let me try to focus you a little bit. I don't really think there's much disagreement over the law. I think it's a matter of semantics whether you say Best Foods changed the law or not. Certainly clarified the law because there were some courts that had held that the law was different in the environmental area, and the Supreme Court clarified that it is not.

There are two basic claims. I'm just focusing on the federal claims for the moment. With respect to the question of derivative liability, there is no disagreement. The plaintiff has to show two elements, domination and control as the first element. And the second element is fraud or wrongdoing that leads to the harm suffered by the plaintiff. I think the key here, as far as I am concerned, is whether there is evidence of misuse of the corporate forum. We're talking about piercing the corporate veil. It has to be misuse of the corporate forum. The corporate forum is a sham in some way. Ordinary shareholder control is not misuse, and there are two specific arguments made by the defendants that I need to hear from Con Edison on. One is this concept of self-piercing. It does seem to me that [3] because the key is misuse of corporate forum, we're talking about harm to third parties, and it kind of doesn't make sense for someone within the corporation to argue that the corporate veil should be pierced. And, indeed, as the defendants point out in their reply papers, Con Edison really doesn't make any effort to address this.

The second point, with respect to derivative liability that Con Edison needs to focus on is: What is the fraud or wrongdoing? I mean, it can't be the environmental harm. That can't be the answer. If that were the answer, then it completely obviates the second element. And I think the fraud or wrongdoing has to be connected to the misuse of the corporate forum, and I don't know that there's any evidence that's been cited to me of fraud. I don't know that there's any argument even of wrongdoing in the sense of misuse of the

corporate forum. Of course, there is an argument for harm in terms of the alleged injury to the environment and expense involved in curing it. But I don't think that's the kind of problem you're talking about.

So that's the first part.

The second main area is owner-operator liability. think the Best Foods case is very clear on this. We are talking about operations in terms of the facility, not the subsidiary. I mean, we're not talking about control of the subsidiary. We are talking about actually participating in the [4] operations, actively participating in the operations. An operator must manage or direct or conduct operations, and these operations must be specifically related to pollution. And by that, I mean a leakage or disposal of waste or compliance with environmental regulations.

There is much discussion in the Best Foods case about overlapping officers and what if someone wears two hats. But I would like to be pointed to specific evidence that UGI actually participated in the operations of the facilities. And if Con Ed thinks I'm wrong in saying that's what Best Foods says, I'm happy to hear that, but I think Best Foods is pretty clear.

All right. So I guess I should hear from the defendants first.

MR. VARON: Thank you, your Honor. Jay Varon, Foley & Lardner, for defendant, UGI, and Jessica Jones from my office at the counsel table.

Your Honor, I think ~~you've~~ summarized the issues from our perspective pretty much as we drafted them and as we see them. I'd like to, I think, just comment and embellish on a couple of those points and also just refer in the beginning to the claims that Con Ed is making under the theories that you outlined.

Obviously this is a little bit of an unusual case in the sense that the events occurred so long ago. Con Ed's basically claiming that UGI's responsible for adding to the [5] contribution, they are seeking contribution for those cleanup costs for ten different Westchester plants for conduct that occurred between 1886 and 1904. Most of the complaint seems to be centered around a company called Westchester Lighting Company, that was formed in 1900. UGI was the parent, owned virtually all of the stock.

Right after it was formed, the board convened a special committee and a consultant to determine whether acquisitions of other companies that essentially owned the ten manufacturing and gas plants should occur, and the committee voted to make the acquisitions, and the acquisitions occurred. And basically Westchester Lighting then came to own these ten manufactured gas plants. Four years later, Westchester Lighting was sold to Con Ed. Westchester Lighting was merged into Con Ed in 1951, and now Con Ed wants to hold UGI responsible because it was the majority owner and because of its conduct under these owner-operator theories.

One argument, your Honor, that you didn't touch on that I think is also in the case and that we deserve summary judgment on relates to three Yonkers plants in that UGI entered into an agreement literally to operate the plants, from 1887—

THE COURT: The release argument?

MR. VARON: The release argument, yes. Just briefly, I'll mention it now and come back to it.

The release argument is essentially that when UGI sold [6] the three Yonkers companies to Westchester Lighting Company, each company and Westchester Lighting released forever all demands and claims under the very agreement that Con Ed wants to use to show that UGI operated it. And I'll come back and talk about that a little bit.

The two other arguments are lurking here, and I just want to reference them quickly because I'd like to address all of them. In Con Ed's reply papers—sorry, opposition papers, they began talking about a company called American Gas, which was a competitor of UGI's back in the early 1900s. They were a holding company.

THE COURT: Your argument is that the veil has to be pierced as to American Gas as well because American Gas actually owns subsidiaries and not the plants themselves.

MR. VARON: That's right. American Gas owned the subs. They don't have the same deficiencies in their piercing arguments governed there and also the same deficiencies in their operator argument governed there. And they also referred to two other plants, a Tarrytown company called Hudson River Gas and Electronic and White Plains owned by White Plans Lighting.

UGI was the parent of those two companies, and there seems to be a similar assertion not really backed up by any documents in the record or anything else, that those corporate veils should be pierced and that UGI's company vis-a-vis those [7] companies also makes them operator. We think it's appropriate for summary judgment because one, as you noted, the standards that Best Foods laid out for owner liability and operator liability are clear. There aren't going to be any fact witnesses. The conduct is going to be proven by the documents, and the documents are in the record, and you can simply look at the documents, consider Con Ed's interpretation of the documents and, I think, conclude that Con Ed doesn't really have evidence, even giving them inferences, that will meet the Best Foods standards.

And, of course, this is the exact methodology that other post-Best Foods courts have used in granting summary judgment in claims just like this. We've cited for your Honor the Schiavone case out of the District of Connecticut, in 1999,

which measured Union Camp's conduct up against the Best Foods standards and found them lacking. The District of Colorado decision in 2001, *U.S. v. Friedland*, in which AO Smith's conduct was measured up against these standards and found lacking both under owner liability and under operator liability. *Daytron v. CRA Holdings*, Western District of Michigan, and I think a particular instructive case from the Tenth Circuit, Raytheon Constructers, on this whole dual employee issue that your Honor mentioned.

Let me make the summary judgment argument, your Honor, on, I think, in three aspects. Let me talk about operator [8] liability first. And let me begin by talking about the seven non-Yonkers plants that existed and which Con Ed claims that UGI was an operator.

Your Honor, I think, looked to the clear Best Foods standard of operator liability: Managing, directing, conducting operations at that facility, specifically related to pollution, i.e., leakage or disposal of hazardous substances. I think it's telling, your Honor, that when you look at Con Ed's brief, they don't even have a section on operator liability that discusses the Best Foods standards or discusses how they meet it. Rather, Con Ed seems to have done exactly what the Best Foods courts said not to, which was diffuse and confuse the two standards for owner liability and operator liability together.

When you read their brief, much of their argument goes to the supposed control that UGI exercised over the companies, over the subsidiaries. Very little goes to the facility, and virtually none of it goes to show pollution. Having said that, a big part of their argument is this dual officer and director argument. As your Honor noted, the Best Foods court observed that phenomenon, said that it was entirely appropriate for there to be dual officers and directors, said that the mere fact that dual officers and directors made policy decisions and supervised activities at the facility wasn't enough to

establish liability. Best Foods established a presumption that [9] when an officer of a sub who is also an officer of a parent acted for the sub and where the parents wore the subsidiary's hat, that his conduct had to be attributable to the sub.

THE COURT: There is an argument that—let me see if I can find the page in the brief, that it's not just the fact of dual officers but that UGI seems to have taken on specific responsibilities. There is a list of the different functions, and some of them, for example, UGI was the purchasing agent, UGI did some other things as well, supposedly.

Of course, I can't find it. No wonder. I'm looking in the wrong brief.

MR. VARON: Your Honor, I think it's fair to say that the plaintiffs do point to a few things that UGI did directly without dual officers. I read the brief as focusing very much on the activities of Walton Clarke and Louis Lilly and George Ramsdale, who served in these very important posts of the subsidiaries. And my argument there is none of that conduct can be attributable to the parent. But what Con Ed does point to that seems to be outside the dual officer/employee thing is, as you said—

THE COURT: I found it. It's on page 37 of Con Ed's brief. UGI was purchasing agent for WLC. UGI was consulting engineer for WLC. I don't see those as mere overlapping officers, although I don't know if there's any detail provided in the record. I'm not sure, whether in its capacity as [10] consulting engineer, UGI actually worked on these facilities.

MR. VARON: Let me try to address that, your Honor.

THE COURT: Yes.

MR. VARON: I don't see any evidence in the record at all that talks about what a consulting engineer does. UGI is appointed a consulting engineer, but I haven't seen any reference to consulting engineers in the UGI minutes, in the

Westchester Lighting Company minutes, in correspondence, in agreements, other than the fact that UGI was appointed to this position.

On the purchasing agent's side, there is some evidence that UGI would enter into contracts for Westchester Lighting Company for things that Westchester Lighting Company would do, and indeed, it would do this for some of its other subsidiaries as well. And I believe we've cited to you a speech by Thomas Dolan, the president of UGI—I think it's Exhibit 4, in our papers—that talks about the business, the business model of UGI. And he says that, you know, Each of our respective subsidiaries have their own boards and their own organizations, but we provide some centralized service. And one of the things he says is, We use centralized servicing to provide minimum pricing for products and services. And there will be evidence in the record that shows, for example, that UGI entered into coal contracts, entered into oil contracts, entered into contracts that would buy lighting equipment—

[11] THE COURT: To buy things bulk at a discount.

MR. VARON: Exactly. And it would do this for all its subsidiaries. And while I agree with you that's not a dual officer piece of conduct, it also isn't abnormal or eccentric. And, secondly, it's not anything that relates to pollution or has anything to do with leakage or disposal. So, I don't think that it's a particularly probative point, and that's where we get to at the end of operator liability, your Honor.

All the evidence that is pointed to either is in this dual officer category, and it seems to me frankly that's where they concentrate. For example, on page 23 of their brief, they note that Walton Clarke was UGI's general superintendent and also the managing director of Westchester Lighting. I believe that Con Ed attributes more significance to the role of managing director than we would, but essentially they say, he

ran the operations of Westchester Lighting Company and its facility. And on page 23 in particular, they say that the superintendents and engineers of the various plants reported directly to Clarke, "who, in the role of managing director, managed and directed the operations of WLC's plant."

And the problem with that, your Honor, is that the managing director was a position of Westchester Lighting Company. Under the presumption created by Best Foods, Clarke's activities as managing director and even if he did direct superintendents of these various plants as managing director of [12] Westchester Lighting, that has to be attributed to Westchester Lighting, not to UGI.

They do the same thing with American Gas. On page 15 of their brief, in a section entitled American Gas' operation of Westchester County NGPs, they assert that the by-laws of some of these subs that American Gas owned were basically operated on a day-to-day managerial responsibility basis by the company's general manager. And then they note that American Gas' general manager, George Ramsdale, was also appointed general manager of the subsidiaries. And they attribute all of Ramsdale's conduct in the minutes in directing the superintendents and the engineers who were employees of Westchester Lighting Company, who really did run the facility on a day-to-day basis as they self-conceded. They attribute that conduct to UGI instead of the sub, and they can't do that.

Raytheon Constructors is probably the best illustration of that. There they reversed a district court's findings pre-Best Foods and then post-Best Foods that the president of a parent who also is the president of a sub and who the defendant concerned was the liaison between the two should have his conduct inspecting mines, managerial advice attributed to the parent, and the Tenth Circuit said no, you have to leave that conduct with the sub, and there's nothing left.

THE COURT: I'm sorry. What was the name of that [13] case?

MR. VARON: Raytheon Constructers case, your Honor, from the Tenth Circuit.

THE COURT: Thank you.

MR. VARON: And Schiavone and the Daytron case, and U.S. v. Friedland are all to the same effect.

Let me move on to the release argument, unless your Honor has any questions on operator liability.

THE COURT: No. That's fine.

MR. VARON: The release argument, your Honor, is that we'll assume that there are sufficient factual questions to label UGI as an operator of the three Yonkers plants, even though we think there are questions about whether two of them even produced gas and whether the agreements were executed, but we know one was executed, and we'll assume all three were.

The gist of the agreements were that UGI was to "operate the gas works." And they were to basically get about 75 percent of the profits, give or take, for doing so, and giving 25 percent back to the Yonkers lessors. Among their obligations were not only to operate the gas works but to maintain the property in good order and condition. They were also supposed to be responsible for any loss or damage that was caused by their negligence and, indeed, there was a negligence claim in this case early on, but the plaintiffs withdrew it.

And what happened, your Honor, is that the operating [14] agreements ran for 20 years, so that when UGI was going to sell the Yonkers companies to Westchester Lighting Company, they still had the right to operate the plants under these agreements, to get the profits. They had the patent rights. They had title to property extensions and the improvements,

all of which were to be provided at the end of the agreement, in return for money. Westchester Lighting Company didn't want to take the companies subject to those terms, and so this was another provision that was reviewed by the special committee. And it's referenced in the special committee report that the consultant also passed on. And they decided to cancel the agreements, and UGI got money and bonds and stock, in return for assigning the patent rights, assigning the property improvements, and the extensions, surrendering the contracts. And they also got a release from Westchester Lighting Company and from each Yonkers company that released forever UGI from all claims and demands under that agreement.

THE COURT: When that was entered into, UGI was out of the picture except as a stockholder from that point forward?

MR. VARON: Yes. UGI was just a—UGI was a stockholder in itself, and it was a stockholder in Westchester Lighting, but that's why they appointed this special committee to decide whether to make these acquisitions and whether to make this deal. And then—

THE COURT: But it didn't have any continuing [15] obligations in terms of operations at that point?

MR. VARON: That was the whole point, to cancel all that. And, so, your Honor, our argument is really very simple.

If you look at page 33 of Con Ed's brief, they argue that under these contracts, and pursuant to these contracts, UGI operated the Yonkers plants and that that's what they're going to use to show UGI's operating liability. And yet they released UGI from all claims and demands, not just from the specific contractual obligations that were listed in the agreement. They released them from all claims and demands under those agreements.

THE COURT: Con Ed argues that the release is only for operating the NGPs.

MR. VARON: Even if it is for operating the NGPs, that's what they're trying to make a claim for. It's a claim that UGI operated the NGP and caused environmental damage. They make two arguments: One, there was no intent to release environmental injuries at that point because nobody knew about environmental injuries. And, of course, the case law on indemnification and releases postcircuit says as long as the language is broad enough, you don't have to have a specifically envisioned environmental claims. Indeed, who could have. But obviously there was an intent to make a clean break with respect to the conduct that each of these parties was engaged in under the operating agreements. And here there was a [16] specific obligation to operate the works and to maintain the property in good condition, and now they want to sue for operator liability.

I think it's very clear, your Honor, but even if there's some doubt about it, New York law also places the obligation here on the releasor, on Con Ed, to prove the scope of the agreement, not on UGI. If you look at the Buffalo Color v. Allied Signal case and the Olin case, both of these cases talk about how indemnification agreements have to be strictly construed against the person trying to take advantage of them, but they contrast that to a situation where there's a release and where the burden is on the releasor, to show what the scope of release is, is not Con Ed.

THE COURT: Okay.

MR. VARON: So for both those reasons, we think the release argument bars their operator liability claims. THE COURT: All right.

MR. VARON: Let me turn quickly to the owner liability claims.

Your Honor focused, I think, appropriately on the second prong. And I agree with your Honor. I don't see any fraud or injustice that any possible misuse or any control could have

caused Con Ed and in fact Macy, Con Ed's expert, who really basically is developing this piercing theory and wants to opine, I think, and properly, but wants to opine that the [17] ultimate issue here that UGI controlled every facet of Westchester Lighting's operations and business such that you shouldn't regard the two entities as separate. When he was asked at deposition, page 171, what injustice is there to Con Ed, he responded that it's not my contention that there's any injustice, and there is none. There's no injustice. There's no fraud.

And as to the environmental harm argument, your Honor, the plaintiffs cite *State v. DeLavila* for that proposition, but that was a Supreme Court decision from Schenectady County. That basically was a case brought by the state against some people that were convicted of violating solid waste rules and now they were trying to get injunctions and statutory penalties, and the court looked at the corporations that the individuals had formed, recited the piercing standards, and found that the corporations were paper shells, had no meetings, issued no stock, paid no franchise taxes, filed no governmental reports, shared employees and equipment, and said we're piercing. No discussion whatsoever of whether there was, whether environmental harm satisfied that second prong or didn't.

And I would submit to your Honor that it could have been anything. It could have been securities fraud. It could have been product liability. It could have been anything. The reason that piercing occurred there was because these promoters [18] basically used a paper shell company to shield criminal activity, and they were frustrating an independent third party's effort to get full relief.

By contrast, the same environmental harm argument that Con Ed makes in its brief and that it cites DeLavila for was made to the court in *State v. Panex*, a Western District of New York case. Also, the state wanted to pierce a corporate

veil. There was apparently a factual question about whether the complete domination standard was sufficient, and the Court nevertheless granted summary judgment on exactly this ground that they didn't see any injustice, any fraud, any wrong. And, of course, the state argued that the wrong was the environmental harm and that the taxpayers would be left holding the bag, if nothing was done.

And the Panex court, I believe, correctly said that if that's the standard, then we would mete out the fraud and injustice prong of every circuit case and every environmental case that exists. And while the court didn't do it, it could have easily cited Best Foods on this point because, as your Honor noted, Best Foods in a sense tried to resolve tensions between environmental compliance and corporate limited liability, and it was very clear that it didn't think CIRCLA was intended to reunite the laws on limited liability or rewrite the laws on veil piercing.

I want to say one thing about the first prong because [19] your Honor did mention that. The first prong, domination and control by the parent, has kind of a laundry list of factors, six or seven different factors that courts look to to figure out whether there's the requisite corporate domination. And among the factors they look at are, very important, the disregard to corporate formalities, inadequate capitalization, intermingling of funds, siphoning of money, commingling of property, and then also common officers and directors and pervasive control of the sub's decisions.

The only evidence that Con Ed has on any of those factors is its evidence that there were common officers and directors and that UGI exercised control over a lot of the decision making. I don't think if you look at the record, your Honor, the evidence of the control that supposedly was exercised is anywhere as pervasive as Con Ed says so. And we've given you a chart, for example, in Exhibit 19, showing you all the independent conduct that Westchester Lighting Company

undertook vis-a-vis UGI when we're comparing UGI executive committee minutes in 1904 and Westchester Lighting minutes in 1904.

We've also given you Exhibit 17, a whole list of Westchester Lighting Company executive minutes, that, when you read them, certainly make it look like Westchester Lighting is making its own decisions, entering into its own contracts, deciding rate issues and all the like. To be sure, UGI did [20] sign that, but even if UGI did control most of the decisions that the sub made, there are no piercing cases cited. And I'm not aware of any that simply pierce because of overlapping directors and officers and—

THE COURT: No reasonable jury could find that WLC is a sham?

MR. VARON: No, I don't think so. Because of the other factors, the adherence to corporate formalities—

THE COURT: Okay.

MR. VARON: —the adequate capitalization.

THE COURT: Why don't you move on. Did you want to say something about anything else on American Gas or White Plains?

MR. VARON: I would just say, your Honor, that the evidence has focused on White—on WLC, the evidence is paltry. There's virtually no evidence in the record about Hudson River Gas or White Plains. I think there are a set of minutes, and all they show is that there were some common officers and directors.

On American Gas, you have similar arguments. I think one argument that Con Ed makes is that American Gas achieved control of New Rochelle Gas and Fuel in 1892. And one of the points they make is that before 1892, there were board meetings, you know, regularly, every month or every other month, and that after American Gas took over, there were

only [21] annual meetings, and they argue that that shows an absence of corporate formalities. And I would say that's not the case; there's no requirement that you have to have board meetings every month as opposed to every year.

And I'd simply close, your Honor, by saying that on all three prongs, the evidence measured up against the law just doesn't meet the Best Foods standards, doesn't meet the piercing standards and shows they really can't meet the burden they have on release. But even if you don't put the burden there, it's clear they released the operating agreement that gives rise to liability. So we think we deserve summary judgment on all three grounds.

THE COURT: Before you sit down, I have not focused on the state law claims.

Do the state law claims require any different analysis?

MR. VARON: I don't believe so, your Honor. I'll tell you about the state law claims in two minutes.

THE COURT: Okay.

MR. VARON: First of all, UGI, the conduct that UGI is accused of, it's accused of derivatively, through its subsidiaries. UGI didn't do anything itself, so that in order for the state law claims to be successful, you have to pierce the subsidiary's veil to reach UGI. So, for all the reasons that we just argued, I think the state law claims go away.

[22] In addition, the state law claims are independently defective for two separate reasons. One is that the Navigation Act claim needs to be brought by a party who is not at fault, and Con Ed clearly was, through Westchester Lighting Company, the owner of this company and, we believe, actually the operator of it. And just like you can't bring a 107 action under CIRCLA, if you were a culpable party, you can't bring a Navigation Act claim if you were not faultless.

So the Navigation Act claim falls and the 1401 contribution claim they have, again, it has to pierce, but it also is predicated on tort liability, and we don't see anything in the record to indicate that Tarrytown was a tort claim. Plaintiffs say it is, but we just don't see the evidence in the record that it involved a tort claim.

THE COURT: Okay. Thank you.

MR. VARON: Thank you.

MR. ELKIND: Your Honor, before I start, if I could briefly approach, I have a series of tabbed documents that I'll be referring to occasionally. For the Court's convenience, have a copy for you and for Mr. Varon.

THE COURT: That's fine.

MR. ELKIND: Your Honor, what I'd like to do is first address the first two points that your Honor raised as the self-piercing point and the point about the fraud or wrongdoing about the second prong of the corporate veil piercing and then [23] go back to the owner-operator issues.

With respect to the self-piercing argument, we think none of their cases are on point. We do not seek to pierce the veil for the period when we were the parent or controlled the subsidiaries, only when they did, and we were strangers to those companies. In other words, prior to 1904, we were a stranger to these entities, and, therefore, there's no reason why we can't pierce that veil for that time frame and, if the facts support it, hold UGI liable.

With respect to the—

THE COURT: Are there any cases that you're aware of that permit, in essence, a former subsidiary to pierce?

MR. ELKIND: We did not find any. With the Court's indulgence, I don't know if we're going to find any, because I think it's a point where there's no cases either way in this circumstance.

THE COURT: There are cases that say it's usually reserved for third parties, for the government. And just conceptually, it makes sense that it should be someone outside the corporate relationship.

MR. ELKIND: At the time of the relevant activities, we were a third party. We were a stranger, and that's the time period at issue, not later on.

Now, with respect to the second prong of the veil piercing argument, a case that we cited but not for this point, [24] and that's my dereliction, is the Second Circuit's decision which is directly on point, the Bedford Affiliates case, decided in 1998. In that case, the Court held that the first prong was satisfied, there was control, because, and I'm going to quote from the decision at 156 F.3d 431: "However, the trial court made no finding on the second element of the veil piercing analysis, namely that Sills'—that was the company—domination led to the state, the site's contamination, i.e., his control was used to commit a wrong that resulted in contamination at the site." And later on, the Court holds, "a finding that. Sills' corporate domination caused the contamination at the site must be made in the first instance by the district court before veil piercing can occur." And that's what happened here.

The case that they cite, that Panex—

THE COURT: If the environmental harm alone were sufficient, doesn't that mean in every environmental case the second prong is academic?

MR. ELKIND: It means that we have to prove that their dominance directly caused the environmental harm. And I'll get into that in a moment, your Honor.

THE COURT: Is that not rewriting the standard?

MR. ELKIND: We do not believe so, your Honor, particularly under the Second Circuit decision in Bedford Affiliates.

[25] THE COURT: Do you concede that there is no evidence of fraud in the record?

MR. ELKIND: We concede that, your Honor. We believe, we do not claim that UGI was not a legitimate company. We believe that their control was so intensive—

THE COURT: Is it Con Ed's position that the corporate form here was a sham?

MR. ELKIND: We believe the corporate forum of all its subsidiaries was a sham, and go into the evidence of that as I go through my presentation.

With respect to the owner-operator liability, I would like to follow up—

THE COURT: Let me just finish up. Let's finish up the derivative liability issue first. Is there an allegation that the subs were underfinanced?

MR. ELKIND: No, your Honor.

THE COURT: Is there an allegation that they all used the same offices?

MR. ELKIND: Officers or offices? Officers, yes. Offices, no.

THE COURT: Is there an allegation that the corporate forum was disregarded?

MR. ELKIND: That's right, your Honor. Out of the seven factors which are set forth in tab 3 of what I've handed your Honor, we believe there's extensive or pervasive control [26] by the shareholder or shareholders, a failure to observe corporate formalities and separateness, in one instance, at least a siphoning of funds from the corporation, in many instances, absence of corporate records, particularly with American Gas, and No. 7, nonfunctioning officers or directors who were functioning always for UGI, not for the

subsidiaries. And I'll go into that, your Honor, as I go through my presentation.

Before I get into the specifics, particularly since counsel mentioned a dearth of evidence on American Gas, I want to follow up on our letter of October 15. On September 16, 18 days after we filed our opposition brief, they first produced more than 300 pages of American Gas minutes. We understand that they were only recently found; I don't mean to cast any aspersions on them. But many of these documents are extremely relevant and further demonstrate that American Gas unless UGI owned and operated five of its plants. And with your Honor's permission, we'd like to file what we prepared, a very short surreply which lists the relevant facts and puts them into context along with an affidavit and exhibits.

We have the original here and we could serve it on Mr. Varon and present it to the Court.

THE COURT: If you wanted to do that, I would have thought that you would have done it before. The request is denied. I'm not going to allow surreply to be handed up now, [27] halfway into the argument. The request is denied.

MR. ELKIND: I'm sorry, your Honor. I had read your letter, your notation on the letter to mean it would be addressed at argument, which is—

THE COURT: I don't remember what I did. If that's what I said, then fine, go ahead, make the argument.

MR, ELKIND: Thank you, your Honor.

There's been little discussion about one factor, that if you pierce the corporate veil on the Best Foods, they're also viable as an operator, even without showing any direct ownership or operation of the site. However, if we can't pierce the veil, they're still liable as an operator if they managed, directed or conducted operations specifically related to pollution, and it's important to realize—

THE COURT: What evidence is there to show that UGI was actually involved in operations with respect to pollution?

MR. ELKIND: Let me go through that, your Honor, if I may.

First of all, let me step back a bit. One of the important issues was how pollution happened at these plants. There is no evidence we've seen of any dumping activities, but most of the pollution appears to have been caused by unintentional leaks, drips, and spills during operation. These plants were a complex systems with underground piping and bases of equipment that were underground, and if you look at tab 2 of [28] what I've handed you, it's an excerpt from the expert report of our environmental expert, Robert Halls.

It addresses specifically contamination at the Tarrytown site, but it pertains to all the sites. There were releases from the routine operations of the facility, and those would have occurred during the ordinary course of business.

Now, with respect to how they operated the plants, I think, first of all, you have to understand how UGI did business and how they operated. Counsel has talked about some specific treaties, but is missing the big picture, and the big picture is set forth in their documents. The first one I would point to is tab 5 of what I've handed to you. It's from their document, UGI Corporation, for the First Hundred Years, dated in 1982.

Now, UGI was founded to promote the LOWE technology for manufacturing gas. It was a carburetor water/gas technology. It revolutionized gas production. And to make these things work, UGI adopted the business strategy set forth at tab 5. They would manufacture, sell, and install LOWE process equipment, operated the plants and profited from the sale of gas. That's how they operated at all of these sites. They installed LOWE water/gas sets, and they operated them and the record shows that.

They also formed new companies, eventually, and built new works whenever there were opportunities to compete. That's [29] how they did business. And I'll continue with the operator liability issue, with these specific sites.

At the Yonkers sites, there's no question they operated the plants from 1887 to 1900. We have the contracts. They installed and operated the LOWE sets under the direction of UGI's James Slade, who was the superintendent. Now, they're arguing that notwithstanding this, somehow the release absolves them of any liability. In fact, that's not the case.

There are three reasons why they're wrong: First of all, this was not an arm's length transaction. As I go through and talk about ownership liability, I'll talk about UGI's dominance of Westchester Lighting Company at the time that this contract was executed. No. 2, we think it's absurd that CIRCLA liability could have been contemplated in 1900. But more importantly, No. 3, the agreement by its terms does not contemplate releasing the claims like this.

Under the case law, which they cite, a pre-CIRCLA release has to be either specific enough to include CIRCLA liability or general enough to include any and all environmental liability. The Keywell Corp. case of the Second Circuit, the language of specific environment representations. In the HatCo case, which is a Third Circuit case, they specifically mention pollution or nuisance claims as what was released. Now—

THE COURT: You're saying that the release doesn't [30] operate to preclude these claims unless it specifically mentioned pollution claims?

MR. ELKIND: No, your Honor. That's one of the standards. It either has to be specific enough to do that or general enough—

THE COURT: It's not specific enough. We can agree on that.

MR. ELKIND: And it's not general enough.

THE COURT: It says all claims and demands by the Yonkers companies and WLC are hereby forever released. Why isn't "all claims and demands" broad enough?

MR. ELKIND: All claims under said agreement are released.

Now, let me step back, the Olin case, which counsel cited, a Second Circuit decision, that was a broad release for all liability hereafter arising. This claims under said agreement, not thereafter arising. The original—

THE COURT: Why isn't that—under this agreement, I think that's a fair argument. It does say all claims and demands thereunder referring to this agreement. Didn't the agreement include cancelling out the 20-year agreements for operating the place? Why doesn't this arise under the agreement?

MR. ELKIND: I believe under said agreement is the original agreement in 1887. The original agreement required [31] UGI to operate the plants and supply the plant's customers.

THE COURT: Right. And if those operations resulted in pollution, why wouldn't claims based on that be released?

MR. ELKIND: If UGI—because they weren't contemplated, your Honor. If UGI breached—

THE COURT: The point of a general release is to release everything and anything that occurred before. In other words, I don't read this as a limited release. It's not a limited release focusing on any particular thing. It's focusing on anything—well, it's limited to the extent that it has to be arising under this agreement. But with respect to this agreement, why wouldn't pollution claims be covered?

MR. ELKIND: Your Honor, if I may explain, the agreement was for the provision of gas to the plant's customers and the operation of equipment. If UGI breached that, the plants could sue for breach of contract, at least until the statute of limitations was released, the agreement released those contractual claims. It didn't release claims as in Olin hereafter arising. That's the language missing here.

THE COURT; But the liability is based on the conduct that occurred prior to that point. Because at that point, UGI's out of the picture. Right?

MR. ELKIND: They're out of the picture. That's correct, your Honor.

THE COURT: So for you to prevail in this case, you [32] have to show that UGI did something up until that point that resulted in the pollution. Correct?

MR. ELKIND: That's correct, your Honor.

THE COURT: And the pollution arose from either providing the gas or operating the equipment. Why isn't that—

MR. ELKIND: That is correct, your Honor.

THE COURT: If that is correct, why doesn't the release bar the claims based on the Yonkers sites?

MR. ELKIND: Your Honor, it's our belief that the release relates to contractual claims, not to environmental claims that arose a hundred years later on. And that's why the Olin case, which talks about claiming viability hereafter arising, would have released these claims. But something that releases claims are hereafter—I'm sorry, that releases claims under said agreement does not do it.

THE COURT: Okay,

MR. ELKIND: Now, with respect to the operation by American Gas, some of this does relate to some of the

documents which we were supplied after our opposition brief, but much of it doesn't.

THE COURT: Do you agree that because American Gas owned the subsidiaries and the subsidiaries operated those five sites that you have to show either piercing or, I guess it's the same issue, that American Gas actually operated within the [33] meaning of Best Foods? You have to show either piercing or operation liability, correct?

MR. ELKIND: Right, your Honor. And we believe we can show that from the record, if your Honor would allow me to lay it out. In fact, perhaps I should talk about both American Gas ownership and operation activities together, because it seems to flow together, particularly from your Honor's comments.

American Gas extensively and pervasively controlled its companies. All pertinent decisions about these companies were made in Philadelphia after American Gas took over the control and management. All they did was leave the names unchanged. They didn't operate these as subsidiaries. They operated these as gas plants, as properties. As we set forth in our brief, upon acquisition of a Westchester company, American Gas' executives were "elected" to executive positions at the company and also American Gas board members were installed as board members of the acquired company. But all corporate decisions then were made in Philadelphia by American Gas based on the reports of American Gas employees who were at the core American Gas in their so-called dual role with the subsidiaries.

Now, counsel has relied on the presumption in Best Foods that when an individual is acting, an individual from a parent is involved with a subsidiary, there's a presumption that they're acting for a subsidiary. We recognize that, but [34] this ignores how these companies did business. This wasn't one person working for one parent and one subsidiary.

American Gas did this with all the companies. The same person or persons ran all of the companies together, and I'll go into that in just a second.

In addition to this pervasive control and nonfunctioning officers and directors, because they all served American Gas, there's also, as counsel alluded to, a failure to observe corporate formalities.

THE COURT: Is there any evidence of fraud, that American Gas engaged in fraud with respect to the operation of these subsidiaries?

MR. ELKIND: There is, not with American Gas, your Honor.

THE COURT: It's the same issue, isn't it, with respect to harm? Is there any evidence of harm, other than the environmental harm?

MR. ELKIND: The harm would be the environmental harm, your Honor.

We also believe there was a failure to observe corporate formalities prior to American Gas' acquisition of these companies. There were frequent board meetings and minutes. The only meetings here were annual meetings for one purpose, to reelect the—

THE COURT: Is that insufficient as a matter of law to [35] have a meeting once a year?

MR. ELKIND: Not if the only purpose was to essentially engage in purported election of company officials who were really serving the parent.

In terms of American Gas' operations, prior to the recent production of documents by UGI, what we were aware of, I think, was sufficient to show operation. The by-laws of each of the Westchester companies that were owned by American Gas placed a day-to-day managerial responsibility for the

operations in the hands of the company's general manager. That was George Ramsdale who was also, not coincidentally, American Gas' general manager, and he was general manager for all of these companies under American Gas' ownership and control.

The superintendent of each manufacturing gas plant reported directly to Mr. Ramsdale, and they could undertake no activity without his approval. He also regularly visited each of the NGPs to monitor their operations.

Now, with respect to the documents that were produced after our opposition was submitted, it's clear from those documents that American Gas ran the plants. They determined the method of gas production, what equipment would be built, and they actually operated the plants. It's patent from this—

THE COURT: When you say that, there is evidence that the individuals who ran the plants were American Gas employees.

[36] MR. ELKIND: Right, under Mr.—or Mr. Ramsdale directed everything and he was the American Gas executive who also ran all of the plants.

THE COURT: Was he also an officer or employee of the subsidiaries?

MR. ELKIND: He held the same title with them, with all of them.

THE COURT: How do you overcome the presumption, the Best Foods presumption?

MR. ELKIND: Your Honor, the presumption is based upon a typical situation where you have one parent and one subsidiary that they recall and their companies not as subsidiaries, as gas plants. That's what Ramsdale did. The corporate forum was not used, what was used was the gas works, and that's how it was referred to in the documents.

THE COURT: These documents are what? These are minutes?

MR. ELKIND: These are minutes, yes.

THE COURT: Okay. You can hand those up. I'll take them.

MS. GARY: May I approach, your Honor.

THE COURT: Yes. What else do you want to tell me?

MR. ELKIND: Let me stick with the operator liability, if I may, briefly.

With respect to, now we've talked about UGI prior to [37] 1900. I've talked about American Gas. I'd like to talk about the operator activity of UGI when Westchester Lighting Company was involved. The key player here is a gentleman named Walton Clarke. He was UGI's general superintendent and was also the managing director of Westchester Lighting Company, and if your Honor will indulge me, when I'm done with the operations liability, I'll go back to the owner liability and I'll explain how UGI did business.

But in the operator context, UGI was, as we mentioned earlier, the purchasing agent and the consulting engineer and so forth. More importantly, Mr. Clarke was UGI's general superintendent and Westchester Lighting Company's managing director, managed and directed the operations of all of the plants. Again, he's not acting for the subsidiary, he's acting for UGI running all their operations, and it's not even limited just to the Westchester operations. All plant superintendents and engineers reported to him. He made the decisions. All of them were made from Philadelphia. That's the way they operated.

If I can go back and touch on some of the ownership issues, I think one of the most important things is to understand how UGI did business. They did it from before they got involved in Westchester up until 1943, when the

SEC, along with the Third Circuit, finally put a stop to everything under the Public Utility Holding Company Act. As I mentioned, they [38] just took over all of the decision-making processes. None of the decisions could be made except in Philadelphia, and they try and spin this—well, one of the documents, it's in the tab that I gave your Honor. It's tab 6, the 1894 Daily Philadelphia Stockholder article. We mentioned it in our brief, and I won't recite the facts there.

THE COURT: You need to slow down a little bit.

MR. ELKIND: I'm sorry.

THE COURT: Yes. Go ahead.

MR. ELKIND: UGI takes issue with the document's admissibility. In fact, in April of this year, in an action they were involved in in New Hampshire where the plaintiff was a utility called Energy North, the court admitted that document finding that it was an ancient document. We think there's no question that satisfies it here. The question of how they did business with all the tight control in Philadelphia is blatant and patent, and they try and spin this by saying they had a sophisticated audit system and used best management practices. In fact, they dominated every material aspect of their empire.

With respect to the UGI ownership, let me start with the period prior to 1900. They initially bought two Yonkers plants. One was the Neperhan plant. They immediately installed their board members as president and they controlled and dominated the board. They then obtained the Yonkers Lubbock plant by about 1900. The evidence shows they ran these [39] plants with the same control as that set forth in the Daily Philadelphia Stockholder article, and they bought the rest of the companies in 1898 and 1900, including from American Gas.

Now, what we have is in the tabbed documents I gave you. Tab 8 is a president Dolan's letter to the stockholders

advising them, this is just as a data point, that the company, UGI now controls the gas lighting business in New York State adjacent to the City of New York. And, again, they ran this like a business, like plants, like gas works, not like subsidiaries. They used, and the evidence is rampant here, UGI people to run the companies.

Again, this isn't a situation where an individual or two individuals were working with one subsidiary. This is how UGI did business, its pervasive control from the get-go. And the situation did not change once Westchester Lighting Company was involved and UGI took them over, because the evidence demonstrates, your Honor, that no meaningful action could be taken without prior approval of UGI, which controlled every aspect of Westchester Lighting Company's existence.

Now, they try to argue, UGI tries to argue that at various times, a majority of the board was "independent." We think that's wrong, but it's also irrelevant. It's based on obituaries. In fact, all of these individuals were officers and directors of the predecessor companies controlled by UGI—

THE COURT: There really isn't much evidence other [40] than the mere fact that they were officers of both, right?

MR. ELKIND: I'm sorry, your Honor. I couldn't hear.

THE COURT: There isn't much evidence other than the fact that they were overlapping officers.

MR. ELKIND: It happened, but they were clearly connected with UGI and with American Gas beforehand. But more importantly, none of the decisions of relevance by the Westchester Lighting Company board were made unless afterwards they were approved by UGI. UGI had to approve everything. And, in fact, the one thing that's not clear from the documents, but we have expert testimony on this, is to demonstrate that the Westchester Lighting Company board

activity was a pretense so that their contracts would not be invalid under New York law. And our expert will testify not on what the documents say, your Honor, or to opine on the ultimate issue, he's not going to do that, but he will place the facts in the context of the norms, parent-subsidiary relationships during this era. And he is the leading expert in the country on corporate governance issues.

Counsel has mentioned twice in his presentation, they have their expert, and they also tried to cite contemporary case law to show what the corporate norms were because the corporate norm is a key issue under Best Foods. But the key facts are in the documents, and they demonstrate that the Westchester Lighting Company board acted subject to UGI [41] approval. UGI had a committee on works, the works committee. It was later replaced by the executive committee. That's who made all the key decisions for Westchester Lighting Company and for all the other UGI lighting companies. And we have UGI's president, Mr. Dolan's letter—

THE COURT: Are there works committee minutes and executive committee minutes?

MR. ELKIND: There are executive committee minutes and also Westchester Lighting board minutes which show the works committee minutes of UGI approving activity because some of the UGI minutes are missing. But they're referenced in the Westchester Lighting Company.

THE COURT: What exhibit number?

MR. ELKIND: There are many of them.

THE COURT: There are seven volumes of exhibits. That's one of my problems.

MR. VARON: I know, your Honor. The Westchester Lighting Company executive committee minutes are Exhibit 17.

THE COURT: Defendant's Exhibit 17?

MR. VARON: Defendant's Exhibit 17. As I mentioned, we have a—the only year in which there are UGI executive committee minutes and Westchester Lighting Company executive committee minutes is 1904. Our Exhibit 19 has a chart that looks at independent action by the UGI executive committee, by the Westchester Lighting executive committee showing who did [42] what when, and then has a third column showing independent things that the Westchester Lighting committee did that was never mentioned in the UGI executive committee minutes, and we also have four years of Westchester Lighting Company executive committee meeting minutes.

We also Westchester Lighting Company board minutes that then shows subsequent approval of activities by UGI. And Mr. Dolan, who is UGI's president, in his letter to the stockholders of May 4, 1903, which is tab 11 of what I handed your Honor, discusses in part the works committee which passes favorably upon all property improvements and extensions of contracts before they are authorized.

The general superintendent, Walton Clarke, who also ran Westchester Lighting Company, was a member, as was Louis Lilly, who was involved in Westchester Lighting Company. One member of this committee is executive officer and treasurer of United Gas Improvement Company. That's how they did business. Every meaningful decision was made in Philadelphia.

Now, several UGI executives were also named, as mentioned, to Westchester Lighting Company's executive committee and well paid UGI for their services, but the payment was unnecessary because they clearly were acting for UGI as part of UGI's running of its empire. This shows siphoning of funds which we believe is another factor under seven factors for piercing corporate veil.

[43] Mr. Clarke, who I mentioned, Walton Clarke, was the general superintendent of UGI. He was Westchester Lighting

Company's managing director, and, under the by-laws, he had unfettered operational control subject only to the works committee approval. The president of the company was a figurehead. That's how they did business.

THE COURT: Why don't you finish up.

MR. ELKIND: Let me briefly get into the state claims.

With respect to the tort claim for which we are seeking contribution, there's no question Con Edison had to pay $1.8 million to the Tarrytown site because of contamination. That's a tort claim, for which we're entitled to contribution, but is not recoverable under CERCLA.

THE COURT: What is the tort? Is it nuisance, or—

MR. ELKIND: It sounds in nuisance. It's a claim that we contaminated his property and it's causing diminution in value.

Now, with respect to the Navigation Act claim, Section 1723, which is what they're referring to in the navigation law, says a claim can only be maintained by a person "who is not responsible for the discharge." And I emphasize the word "the." It doesn't say responsible for any discharge.

Now, there's a Court of Appeals case from 1995, White v. Long. The court held that an innocent landowner, although it technically meets the statutory definition of discharger, [44] can still sue. Well, at the time that they were involved with the plants that we were a stranger to these plants, they contaminated those plants in separate discharges from what may have happened when we were involved, and we do not believe that the navigation law bars our claim.

THE COURT: Do you agree that the state law claims are premised on piercing the corporate veil?

MR. ELKIND: They are, your Honor.

THE COURT: Okay. All right.

MR. ELKIND: That's all I have. Thank you.

THE COURT: All right. Thank you.

MR. VARON: Just touch on a few quick things.

THE COURT: How do you respond to the argument that there is evidence that UGI had to approve everything? And I guess the related argument that this is not a situation where it's one sub and one parent, but when UGI appoints the same guy to run five or six or seven or eight different subs, that that's something different?

MR. VARON: I guess I'd respond in two ways, your Honor.

I don't think that the characterizations are accurate. If you look at Dolan's letter, which was written in 1903, before he could possibly anticipate any of this, he says, I'm reading from page 97 of our appendix, Exhibit 1—sorry, volume 1. It's Exhibit 4. "The direct control and active [45] management of the various companies in which your company is a shareholder are vested in their respective boards of directors, and each company has a complete official organization of its own."

And, your Honor, that is the model. Each company was formed and organized properly, had boards of directors in which UGI had some dual—

THE COURT: There does seem to be lots of evidence to show that the formalities were followed and there were separate boards, but there also seems to be some evidence of involvement in a sense of approvals, etc. Is it wrong that UGI had to approve—

MR. VARON: No, your Honor.

THE COURT: I'm sorry?

MR. VARON: It's not wrong. Yes, there was some approval, and Best Foods, itself, as I think your Honor noted,

talked about certain direct involvement as opposed to dual officer involvement, and the direct involvement is subject to a test of normal parent/subsidiary relationships. And Best Foods has said that a whole variety of things are normal. And then these other post-Best Foods decisions have said that a whole variety of things are normal, and they include approving capital and finance budgets and expenditures. They include approving contracts. They include, you know, a whole range of monitoring performance activities, which essentially was what [46] was done. And furthermore, I guess, your Honor, none of the activities that plaintiffs point to, the improvement of contracts, the setting of salaries, the approval of rates, have anything to do from an operator liability standpoint with pollution or with the leakage or disposal of hazardous waste.

So, again, the plaintiffs—

THE COURT: The argument is that the pollution resulted from the general operations, spills, leaking pipes, etc., and so to show that they were involved generally in the operations is arguably enough— well, it is enough. That's the argument.

MR. VARON: I don't think so, your Honor. They're showing that UGI was involved in the operation of a business. But, again, Best Foods is very clear that you need to separate out the tests for operator liability and focus on conduct at the facility versus the control of the business. And Con Ed is basically just throwing all this very generalized stuff, citing from corporate histories and 1945 SEC decisions about the general manner in which UGI operated. And when you parse the general stuff, there is no evidence that shows that UGI in any of these specific situations operated the facility with respect to pollution or control. Yes, they had a very strict accounting and budget system. They approved all kinds of requisitions for accounts.

THE COURT: I didn't ask this before, but what is the [47] burden of proof on piercing? Is it clear and convincing, or is it preponderance?

MR. VARON: I guess, your Honor—

THE COURT: Is there a fraud element involved?

MR. VARON: Except for the fraud element, I would think it's clear and convincing. Perhaps the complete domination element is a preponderance. I'm not sure.

THE COURT: Okay.

MR. VARON: I'm not sure. But I really—if you listen to Con Ed's argument, there's a lot of rhetoric there, your Honor. The decisions were made in Philadelphia, they pervasively and actively controlled everything. Where are the documents? Where are the specific references that show what was done? We know what was done. I mean, I've listed them for you in our statement of material facts. They approved contracts, they approved rates, they looked at expenditures.

THE COURT: I want to take a five-minute recess and come back. I might rule on some of it. I'm not sure. I want to check a couple things.

(Recess)

THE COURT: Be seated.

All right. I'm going to grant the motion in part and I'm going to reserve decision in part.

First, all the piercing claims are dismissed.

Second, all the claims with respect to the Yonkers [48] MGPs are dismissed.

And, third, I am going to reserve decision as to the owner-operator claims with respect to the other seven sites.

Just to elaborate a little bit, first, with respect to the piercing claims, I think there are three independent bases to grant the

motion. First, I think the defendant's self-piercing theory is correct. We are talking about misuse of the corporate forum that causes harm to third parties. We are not talking about a situation where a company itself argues piercing to sue a shareholder. That just doesn't make sense. There are cases that say the harm has to be to a third party, and here, because it is the company itself arguing that its former shareholder is liable under a piercing veil, I reject the claim.

Second, even assuming that is wrong, an independent basis exists with respect to the second prong of the two-prong test. I think this is the stronger argument. The only harm alleged is the general environmental harm. That cannot be enough, otherwise it completely obviates the second prong. The point of a piercing the corporate veil claim is that the misuse of the corporate forum causes harm to someone. It's the misuse of the corporate forum that is the key. And here, Con Ed concedes that there was no fraud and the only harm that is argued is the environmental harm.

Panex Industries is an example of a case where a court [49] recognized that permitting the general environmental harm to be sufficient to meet the second prong would eliminate the second prong, in CERCLA cases. And that does not make sense, and CERCLA does not rewrite the long-standing law on corporations and piercing the veil. I did take a look at the Second Circuit case relied on by Con Ed, Bedford Affiliates, and, you know, all I could say is the language is a little bit unclear. It seems to me that it doesn't precisely distinguish between operator liability and piercing the corporate veil liability. The district court there didn't address the second issue at all, and the Second Circuit was saying that the district court had to address the second issue. And I'm not really sure what it intended. But, as a matter of logic and based on the other cases cited by the defendants, it is clear to me that the second prong has to require some fraud or harm that flows from the misuse of the corporate forum.

Third, a third independent basis for dismissing the piercing claims is that I do believe that no reasonable jury could find domination and control here to the extent necessary to accept the piercing argument. Some of the factors are met, including, of course, the overlapping directors and officers. But many of the factors are not met, and no reasonable jury could find that the corporate entities here were a sham. And so all of the veil-piercing claims are dismissed.

Secondly, with respect to the Yonkers MGPs, those [50] claims are dismissed as well because of the release. The claims for owner-operator liability are dismissed as well because of the release. The release is broad. And I lost the language, but my recollection is that it's any claim or demand thereunder, thereunder referring to the agreement. As counsel for Con Ed conceded, the pollution claims arise from the provision of gas and the operation of the equipment used to manufacture and provide gas. And to me, it's clear as a bell. The pollution claims, therefore, arise under the agreement. This is not a specific release; it is a general release, but I conclude that the language is broad enough to pick up the pollution claim, and therefore, those claims are dismissed.

With respect to the operation, the owner-operator claims with respect to the other seven sites, I will reserve decision. I need to take a look at some of the minutes, read some more of the cases and also just take a closer look at the record, and so T will address the balance of the motion in due course.

All right. I'll ask the parties to order the transcript so that I have it, and you will hear from me soon, hope. Thank you very much.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 01 CIV. 8520 (DC)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff,

v.

UGI UTILITIES, INC.,
Defendant.

STIPULATION AND ORDER ACCEPTING AMENDED TRANSCRIPT

IT IS HEREBY STIPULATED by and between the parties that the corrected transcript of the summary judgment argument in the above-captioned case, before Judge Chin, on November 25, 2003, at 11:00 a.m., is hereby amended according to the attached errata sheet.

/s/ Jay N. Varon
JAY N. VARON
JESSICA H. JONES
FOLEY & LARDNER
3000 K Street, N.W.
Suite 500
Washington, D.C. 20007
(202) 672-5300

Counsel for Defendant,
UGI Utilities, Inc.

/s/ David L. Elkind
DAVID L. ELKIND
ANDREW C. COOPER
KEISHA A. GARY
DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

Counsel for Plaintiff
Consolidated Edison
Company of New York, Inc.

IT IS ORDERED this 28th day of January, 2004

/s/ The Honorable Denny Chin
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 01 CIV. 8520 (DC)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff,

v.

UGI UTILITIES, INC.,
Defendant.

ERRATA SHEET TO CORRECTED TRANSCRIPT OF
NOVEMBER 25, 2003 SUMMARY JUDGMENT
ARGUMENT BEFORE JUDGE CHIN

Page 5	Line 10	"manufactured" not "manufacturing and"
Page 6	Line 16	Strike "don't"
Page 6	Line 20	"Electric" not "Electronic"
Page 6	Line 20	"White Plains" not "White Plans"
Page 6	Line 25	"control" not "company"
Page 7	Line 1	Insert "an" before "operator"
Page 7	Line 17	"A.O." not "AO"
Page 7	Line 20	"Datron" not "Daytron"
Page 7	Line 21	"particularly" not "particular"
Page 7	Line 22	"Constructors" not "Constructers"
Page 8	Line 12	"to fuse" not "diffuse"
Page 9	Line 15	"Clark" not "Clarke"

Page 9	Line 15	"Lillie" not "Lilly"
Page 9	Line 16	"Ramsdell" not "Ramsdale"
Page 11	Line 12	"Clark" not "Clarke"
Page 11	Line 19	"Clark" not "Clarke"
Page 11	Line 23	"Clark's" not "Clarke's"
Page 12	Line 5	"MGPs" not "NGPs"
Page 12	Line 9	"Ramsdell" not "Ramsdale"
Page 12	Line 11	"Ramsdell's" not "Ramsdale's"
Page 12	Line 20	"contended" not "concerned"
Page 12	Line 21	Insert "and" before "managerial"
Page 13	Line 2	"Constructors" not "Constructers"
Page 13	Line 5	"Datron" not "Daytron"
Page 15	Line 20	"in this circuit" not "postcircuit"
Page 16	Line 13	Replace "," with ";" and change "is not" to "that's on"
Page 16	Line 23	"Macey" not "Macy"
Page 16	Line 25	"improperly" not "and properly"
Page 17	Line 9	"Della Villa" not "DeLavila"
Page 18	Line 7	"the" not "a"
Page 18	Line 16	"read" not "mete"
Page 18	Line 17	"CERCLA" not "circuit"
Page 18	Line 23	"rewrite" not "reunite"
Page 19	Line 1	"didn't" not "did"
Page 20	Line 2	Insert "," after "cited" and change "And" to "and"

Page 22	Line 9	"fails" not "falls"
Page 26	Line 16	"and thus" not "unless"
Page 27	Line 9	"under" not "on the"
Page 27	Line 10	"liable" not "viable"
Page 27	Line 24	Strike "a"
Page 28	Line 2	"Karls" not "Halls"
Page 28	Line 10	"trees" not "treaties"
Page 28	Line 16	"carbureted" not "carburetor"
Page 29	Line 21	Insert "has" before "the"
Page 29	Line 22	"Hatco" not HatCo"
Page 32	Line 13	"liability" not "viability"
Page 33	Line 20	Insert "of" after "core"
Page 35	Line 11	"Ramsdell" not "Ramsdale"
Page 35	Line 15	"Ramsdell" not "Ramsdale"
Page 35	Line 17	"MGPs" not "NGPs"
Page 36	Line 1	"Ramsdell" not "Ramsdale"
Page 36	Line 13	"Ramsdell" not "Ramsdale"
Page 37	Line 4	"Clark" not "Clarke"
Page 37	Line 11	"Clark" not "Clarke"
Page 38	Line 22	"Nepperhan" not "Neperhan"
Page 38	Line 25	"Ludlow" not "Lubbock"
Page 40	Line 20	Insert "him" after "mentioned"
Page 42	Line 6	Insert "Mr. Elkind:" before "We"
Page 42	Line 6	Insert "have" after "also"

Page 42	Line 13	"Clark" not "Clarke"
Page 42	Line 15	"Lillie" not "Lilly"
Page 42	Line 21	"WLC" not "well"
Page 43	Line 1	"Clark" not "Clarke" (two times)
Page 46	Line 2	"approval" not "improvement"

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed March 31, 2004]

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01 CIVIL 8520 (DC)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff,

v.

UGI UTILITIES, INC.,
Defendant.

JUDGMENT

Defendant having moved for summary judgment pursuant to Fed. R. Civ. P. 56, and the matter having come before the Honorable Denny Chin, United States District Judge, and the Court, on March 29, 2004, having rendered its Opinion (89875) granting defendant's motion in its entirety and dismissing the complaint with prejudice and with costs, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (89875) and Order dated March 29, 2004, defendant's motion is granted in its entirety and the complaint is dismissed with prejudice and with costs; accordingly, the case is closed.

Dated: New York, New York
March 31, 2004

J. Michael McMahon
Clerk of the Court

BY: /s/ _____
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

[Filed January 18, 2006]

Roseann B. MacKechnie
Clerk

Date:	1/17/06
Docket number:	04-2409-cv
Short Title:	Con Edison Co. of NY v. UGI Utilities
DC Docket Number:	01-cv-8520
DC:	SDNY (NEW YORK CITY)
DC JUDGE:	Honorable Denny Chin

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 18th day of January two thousand six.

Consolidated Edison v. UGI Utilities, Inc. 04-2409-cv

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee UGI Utilities, Inc. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

APPENDIX G

42 U.S.C. § 9607

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and dam ages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a pub-

lished tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of Title 49), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33, 46, or 46 Appendix, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the

owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Natural resources liability; designation of public trustees of natural resources

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however*, That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license.

so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal

officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter and such section 1321 of Title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33.

(g) Federal agencies

For provisions relating to Federal agencies, see section 9620 of this title.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) [46 App. U.S.C.A. §§ 182, 183, 184 to 188] or the absence of any physical damage to the proprietary interest of the claimant.

(i) Application of a registered pesticide product

No person (including the United States or any State or Indian tribe) may recover under the authority of this section

for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-Closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the

Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 of this title when—

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration off-site or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C.A. § 6926(b)]) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Admin-

istrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for post-closure financial responsibility for hazardous waste disposal

facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) Suspension of liability transfer

Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 9611 of this title, no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 9641 of this title prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) Study of options for post-closure program

(A) Study

The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment.

(B) Program elements

The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) Assessments

The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act [42 U.S.C.A. § 6925] and the likelihood of future insolvency on the part of owners and

operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to—

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) Procedures

In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) Consideration of options

In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to—

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of the Solid Waste Disposal Act [42 U.S.C.A. §§ 6921 et seq. and 6991 et seq.];

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 9641 of this title, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) Recommendations

The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(*l*) Federal lien

(1) In general

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of this section) shall constitute a lien in favor

of the United States upon all real property and rights to such property which—

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title.

(3) Notice and validity

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such

notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of Title 26.

(4) Action in rem

The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) Maritime lien

All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) of this section with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(n) Liability of fiduciaries

(1) In general

The liability of a fiduciary under any provision of this chapter for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

(2) Exclusion

Paragraph (1) does not apply to the extent that a person is liable under this chapter independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

(3) Limitation

Paragraphs (1) and (4) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

(4) Safe harbor

A fiduciary shall not be liable in its personal capacity under this chapter for—

(A) undertaking or directing another person to undertake a response action under subsection (d)(1) of this section or under the direction of an on scene coordinator designated under the National Contingency Plan;

(B) undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the vessel or facility;

(C) terminating the fiduciary relationship;

(D) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

(E) monitoring or undertaking 1 or more inspections of the vessel or facility;

(F) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(G) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(H) administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began; or

(I) declining to take any of the actions described in subparagraphs (B) through (H).

(5) Definitions

As used in this chapter:

(A) Fiduciary

The term "fiduciary"—

(i) means a person acting for the benefit of another party as a bona fide—

(I) trustee;

(II) executor;

(III) administrator;

(IV) custodian;

(V) guardian of estates or guardian ad litem;

(VI) receiver;

(VII) conservator;

(VIII) committee of estates of incapacitated persons;

(IX) personal representative;

(X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

(XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and

(ii) does not include—

(I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or

(II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

(B) Fiduciary capacity

The term "fiduciary capacity" means the capacity of a person in holding title to a vessel or facility, or otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(6) Savings clause

Nothing in this subsection—

(A) affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this subsection; or

(B) creates any liability for a person or a private right of action against a fiduciary or any other person.

(7) No effect on certain persons

Nothing in this subsection applies to a person if the person—

(A)(i) acts in a capacity other than that of a fiduciary or in a beneficiary capacity; and

(ii) in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(B)(i) is a beneficiary and a fiduciary with respect to the same fiduciary estate; and

(ii) as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(8) Limitation

This subsection does not preclude a claim under this chapter against—

(A) the assets of the estate or trust administered by the fiduciary; or

(B) a nonemployee agent or independent contractor retained by a fiduciary.

(o) De micromis exemption

(1) In general

Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this chapter if liability is based solely on paragraph (3) or (4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that—

(A) the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for

disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and

(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

(2) Exceptions

Paragraph (1) shall not apply in a case in which—

(A) the President determines that—

(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

(ii) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility; or

(B) a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.

(3) No judicial review

A determination by the President under paragraph (2)(A) shall not be subject to judicial review.

(4) NonGovernmental third-party contribution actions

In the case of a contribution action, with respect to response costs at a facility on the National Priorities List, brought by a party, other than a Federal, State, or local gov-

ernment, under this chapter, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraph (1)(A) and (B) of this subsection are not met.

(p) Municipal solid waste exemption

(1) In general

Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under paragraph (3) of subsection (a) of this section for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is—

(A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;

(B) a business entity (including a parent, subsidiary, or affiliate of the entity) that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631 et seq.)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility; or

(C) an organization described in section 501(c)(3) of Title 26 and exempt from tax under section 501(a) of Title 26 that, during its taxable year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

For purposes of this subsection, the term "affiliate" has the meaning of that term provided in the definition of "small business concern" in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631 et seq.).

(2) Exception

Paragraph (1) shall not apply in a case in which the President determines that—

(A) the municipal solid waste referred to in paragraph (1) has contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility;

(B) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter; or

(C) the person has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility.

(3) No judicial review

A determination by the President under paragraph (2) shall not be subject to judicial review.

(4) Definition of municipal solid waste

(A) In general

For purposes of this subsection, the term "municipal solid waste" means waste material—

(i) generated by a household (including a single or multifamily residence); and

(ii) generated by a commercial, industrial, or institutional entity, to the extent that the waste material—

(I) is essentially the same as waste normally generated by a household;

(II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and

(III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

(B) Examples

Examples of municipal solid waste under subparagraph (A) include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

(C) Exclusions

The term "municipal solid waste" does not include—

(i) combustion ash generated by resource recovery facilities or municipal incinerators; or

(ii) waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households.

(5) Burden of proof

In the case of an action, with respect to response costs at a facility on the National Priorities List, brought under this section or section 9613 of this title by—

(A) a party, other than a Federal, State, or local government, with respect to municipal solid waste disposed of on or after April 1, 2001; or

(B) any party with respect to municipal solid waste disposed of before April 1, 2001, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraphs (1) and (4) for exemption for entities and organizations described in paragraph (1)(B) and (C) are not met.

(6) Certain actions not permitted

No contribution action may be brought by a party, other than a Federal, State, or local government, under this chapter with respect to circumstances described in paragraph (1)(A).

(7) Costs and fees

A nongovernmental entity that commences, after the date of the enactment of this subsection, a contribution action under this chapter shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees, if the defendant is not liable for contribution based on an exemption under this subsection or subsection (o) of this section.

(q) Contiguous properties

(1) Not considered to be an owner or operator

(A) In general

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not—

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person—

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) At the time at which the person acquired the property, the person

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

(B) Demonstration

To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) Bona fide prospective purchaser

Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 9601(40) of this title if the person is otherwise described in that section.

(D) Ground water

With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accor-

dance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) Effect of law

With respect to a person described in this subsection, nothing in this subsection—

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a) of this section.

(3) Assurances

The Administrator may—

(A) issue an assurance that no enforcement action under this chapter will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 9613(f) of this title.

(r) Prospective purchaser and windfall lien

(1) Limitation on liability

Notwithstanding subsection (a)(1) of this section, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) Lien

If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the

conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) Conditions

The conditions referred to in paragraph (2) are the following:

(A) Response action

A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) Fair market value

The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) Amount; duration

A lien under paragraph (2)—

(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of—

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 9613 of this tile, recovery of all response costs incurred at the facility.

APPENDIX H

42 U.S.C. § 9613

§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter

is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or

damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a

removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

(j) Judicial review

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance

with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures

(1) Administrative record

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of Title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The

procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regulations in accordance with chapter 5 of Title 5 to carry out the requirements of this subparagraph.

(C) Interim record

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this chapter shall not include an adjudicatory hearing.

(D) Potentially responsible parties

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(*l*) Notice of actions

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

APPENDIX I

42 U.S.C. § 9622

§ 9622. Settlements

(a) Authority to enter into agreements

The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604(b) of this title) if the President determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

(b) Agreements with potentially responsible parties

(1) Mixed funding

An agreement under this section may provide that the President will reimburse the parties to the agreement from the Fund, with interest, for certain costs of actions under the agreement that the parties have agreed to perform but which the President has agreed to finance. In any case in which the President provides such reimbursement, the President shall make all reasonable efforts to recover the amount of such reimbursement under section 9607 of this title or under other relevant authorities.

(2) Reviewability

The President's decisions regarding the availability of fund financing under this subsection shall not be subject to judicial review under subsection (d) of this section.

(3) Retention of funds

If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement.

(4) Future obligation of Fund

In the case of a completed remedial action pursuant to an agreement described in paragraph (1), the Fund shall be subject to an obligation for subsequent remedial actions at the same facility but only to the extent that such subsequent actions are necessary by reason of the failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action. The Fund's obligation for such future remedial action may be met through Fund expenditures or through payment, following settlement or enforcement action, by parties who were not signatories to the original agreement.

(c) Effect of agreement

(1) Liability

Whenever the President has entered into an agreement under this section, the liability to the United States under this chapter of each party to the agreement, including any future liability to the United States, arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with subsection (f) of this section. A covenant not to sue may provide that future liability to the

United States of a settling potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. Nothing in this section shall limit or otherwise affect the authority of any court to review in the consent decree process under subsection (d) of this section any covenant not to sue contained in an agreement under this section. In determining the extent to which the liability of parties to an agreement shall be limited pursuant to a covenant not to sue, the President shall be guided by the principle that a more complete covenant not to sue shall be provided for a more permanent remedy undertaken by such parties.

(2) Actions against other persons

If an agreement has been entered into under this section, the President may take any action under section 9606 of this title against any person who is not a party to the agreement, once the period for submitting a proposal under subsection (e)(2)(B) of this section has expired. Nothing in this section shall be construed to affect either of the following:

(A) The liability of any person under section 9606 or 9607 of this title with respect to any costs or damages which are not included in the agreement.

(B) The authority of the President to maintain an action under this chapter against any person who is not a party to the agreement.

(d) Enforcement

(1) Cleanup agreements

(A) Consent decree

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 9606 of this title, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain admin-

istrative settlements referred to in subsection (g) of this section, the agreement shall be entered in the appropriate United States district court as a consent decree. The President need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

(B) Effect

The entry of any consent decree under this subsection shall not be construed to be an acknowledgment by the parties that the release or threatened release concerned constitutes an imminent and substantial endangerment to the public health or welfare or the environment. Except as otherwise provided in the Federal Rules of Evidence, the participation by any party in the process under this section shall not be considered an admission of liability for any purpose, and the fact of such participation shall not be admissible in any judicial or administrative proceeding, including a subsequent proceeding under this section.

(C) Structure

The President may fashion a consent decree so that the entering of such decree and compliance with such decree or with any determination or agreement made pursuant to this section shall not be considered an admission of liability for any purpose.

(2) Public participation

(A) Filing of proposed judgment

At least 30 days before a final judgment is entered under paragraph (1), the proposed judgment shall be filed with the court.

(B) Opportunity for comment

The Attorney General shall provide an opportunity to persons who are not named as parties to the action to com-

ment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

(3) 9604(b) agreements

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to action under section 9604(b) of this title, the President shall issue an order or enter into a decree setting forth the obligations of such party. The United States district court for the district in which the release or threatened release occurs may enforce such order or decree.

(e) Special notice procedures

(1) Notice

Whenever the President determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible parties for taking response action (including any action described in section 9604(b) of this title) and would expedite remedial action, the President shall so notify all such parties and shall provide them with information concerning each of the following:

(A) The names and addresses of potentially responsible parties (including owners and operators and other persons referred to in section 9607(a) of this title), to the extent such information is available.

(B) To the extent such information is available, the volume and nature of substances contributed by each potentially responsible party identified at the facility.

(C) A ranking by volume of the substances at the facility, to the extent such information is available.

The President shall make the information referred to in this paragraph available in advance of notice under this paragraph upon the request of a potentially responsible party in accordance with procedures provided by the President. The provisions of subsection (e) of section 9604 of this title regarding protection of confidential information apply to information provided under this paragraph. Disclosure of information generated by the President under this section to persons other than the Congress, or any duly authorized Committee thereof, is subject to other privileges or protections provided by law, including (but not limited to) those applicable to attorney work product. Nothing contained in this paragraph or in other provisions of this chapter shall be construed, interpreted, or applied to diminish the required disclosure of information under other provisions of this or other Federal or State laws.

(2) Negotiation

(A) Moratorium

Except as provided in this subsection, the President may not commence action under section 9604(a) of this title or take any action under section 9606 of this title for 120 days after providing notice and information under this subsection with respect to such action. Except as provided in this subsection, the President may not commence a remedial investigation and feasibility study under section 9604(b) of this title for 90 days after providing notice and information under this subsection with respect to such action. The President may commence any additional studies or investigations authorized under section 9604(b) of this title, including remedial design, during the negotiation period.

(B) Proposals

Persons receiving notice and information under paragraph (1) of this subsection with respect to action under section 9606 of this title shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 9606 of this title. Persons receiving notice and information under paragraph (1) of this subsection with respect to action under section 9604(b) of this title shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 9604(b) of this title.

(C) Additional parties

If an additional potentially responsible party is identified during the negotiation period or after an agreement has been entered into under this subsection concerning a release or threatened release, the President may bring the additional party into the negotiation or enter into a separate agreement with such party.

(3) Preliminary allocation of responsibility

(A) In general

The President shall develop guidelines for preparing nonbinding preliminary allocations of responsibility. In developing these guidelines the President may include such factors as the President considers relevant, such as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors. When it would expedite settlements under this section and remedial action, the President may, after completion of the remedial investigation and feasibility study, provide a nonbinding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility.

(B) Collection of information

To collect information necessary or appropriate for performing the allocation under subparagraph (A) or for otherwise implementing this section, the President may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the President deems necessary. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In the event of contumacy or failure or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper shall have jurisdiction to order any such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as a contempt thereof.

(C) Effect

The nonbinding preliminary allocation of responsibility shall not be admissible as evidence in any proceeding, and no court shall have jurisdiction to review the nonbinding preliminary allocation of responsibility. The nonbinding preliminary allocation of responsibility shall not constitute an apportionment or other statement on the divisibility of harm or causation.

(D) Costs

The costs incurred by the President in producing the nonbinding preliminary allocation of responsibility shall be reimbursed by the potentially responsible parties whose offer is accepted by the President. Where an offer under this section is not accepted, such costs shall be considered costs of response.

(E) Decision to reject offer

Where the President, in his discretion, has provided a nonbinding preliminary allocation of responsibility and the

potentially responsible parties have made a substantial offer providing for response to the President which he rejects, the reasons for the rejection shall be provided in a written explanation. The President's decision to reject such an offer shall not be subject to judicial review.

(4) Failure to propose

If the President determines that a good faith proposal for undertaking or financing action under section 9606 of this title has not been submitted within 60 days of the provision of notice pursuant to this subsection, the President may thereafter commence action under section 9604(a) of this title or take an action against any person under section 9606 of this title. If the President determines that a good faith proposal for undertaking or financing action under section 9604(b) of this title has not been submitted within 60 days after the provision of notice pursuant to this subsection, the President may thereafter commence action under section 9604(b) of this title.

(5) Significant threats

Nothing in this subsection shall limit the President's authority to undertake response or enforcement action regarding a significant threat to public health or the environment within the negotiation period established by this subsection.

(6) Inconsistent response action

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

(f) Covenant not to sue

(1) Discretionary covenants

The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this chapter, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether that action is onsite or offsite, if each of the following conditions is met:

(A) The covenant not to sue is in the public interest.

(B) The covenant not to sue would expedite response action consistent with the National Contingency Plan under section 9605 of this title.

(C) The person is in full compliance with a consent decree under section 9606 of this title (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.

(D) The response action has been approved by the President.

(2) Special covenants not to sue

In the case of any person to whom the President is authorized under paragraph (1) of this subsection to provide a covenant not to sue, for the portion of remedial action—

(A) which involves the transport and secure disposition offsite of hazardous substances in a facility meeting the requirements of sections 6924(c), (d), (e), (f), (g), (m), (o), (p), (u), and (v) and 6925(c) of this title, where the President has rejected a proposed remedial action that is consistent with the National Contingency Plan that does not include such offsite disposition and has thereafter required offsite disposition; or

(B) which involves the treatment of hazardous substances so as to destroy, eliminate, or permanently immo-

bilize the hazardous constituents of such substances, such that, in the judgment of the President, the substances no longer present any current or currently foreseeable future significant risk to public health, welfare or the environment, no byproduct of the treatment or destruction process presents any significant hazard to public health, welfare or the environment, and all byproducts are themselves treated, destroyed, or contained in a manner which assures that such byproducts do not present any current or currently foreseeable future significant risk to public health, welfare or the environment, the President shall provide such person with a covenant not to sue with respect to future liability to the United States under this chapter for a future release or threatened release of hazardous substances from such facility, and a person provided such covenant not to sue shall not be liable to the United States under section 9606 or 9607 of this title with respect to such release or threatened release at a future time.

(3) Requirement that remedial action be completed

A covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the requirements of this chapter at the facility that is the subject of such covenant.

(4) Factors

In assessing the appropriateness of a covenant not to sue under paragraph (1) and any condition to be included in a covenant not to sue under paragraph (1) or (2), the President shall consider whether the covenant or condition is in the public interest on the basis of such factors as the following:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(B) The nature of the risks remaining at the facility.

(C) The extent to which performance standards are included in the order or decree.

(D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

(E) The extent to which the technology used in the response action is demonstrated to be effective.

(F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

(5) Satisfactory performance

Any covenant not to sue under this subsection shall be subject to the satisfactory performance by such party of its obligations under the agreement concerned.

(6) Additional condition for future liability

(A) Except for the portion of the remedial action which is subject to a covenant not to sue under paragraph (2) or under subsection (g) of this section (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned.

(B) In extraordinary circumstances, the President may determine, after assessment of relevant factors such as those referred to in paragraph (4) and volume, toxicity, mobility,

strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception referred to in subparagraph (A) if other terms, conditions, or requirements of the agreement containing the covenant not to sue are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility.

(C) The President is authorized to include any provisions allowing future enforcement action under section 9606 or 9607 of this title that in the discretion of the President are necessary and appropriate to assure protection of public health, welfare, and the environment.

(g) De minimis settlements

(1) Expedited final settlement

Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(B) The potentially responsible party—

(i) is the owner of the real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(2) Covenant not to sue

The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f) of this section.

(3) Expedited agreement

The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

(4) Consent decree or administrative order

A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any facility where the total response costs exceed $500,000 (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator

have agreed to extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.

(5) Effect of agreement

A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(6) Settlements with other potentially responsible parties

Nothing in this subsection shall be construed to affect the authority of the President to reach settlements with other potentially responsible parties under this chapter.

(7) Reduction in settlement amount based on limited ability to pay

(A) In general

The condition for settlement under this paragraph is that the potentially responsible party is a person who demonstrates to the President an inability or a limited ability to pay response costs.

(B) Considerations

In determining whether or not a demonstration is made under subparagraph (A) by a person, the President shall take into consideration the ability of the person to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues.

(C) Information

A person requesting settlement under this paragraph shall promptly provide the President with all relevant information needed to determine the ability of the person to pay response costs.

(D) Alternative payment methods

If the President determines that a person is unable to pay its total settlement amount at the time of settlement, the President shall consider such alternative payment methods as may be necessary or appropriate.

(8) Additional conditions for expedited settlements

(A) Waiver of claims

The President shall require, as a condition for settlement under this subsection, that a potentially responsible party waive all of the claims (including a claim for contribution under this chapter) that the party may have against other potentially responsible parties for response costs incurred with respect to the facility, unless the President determines that requiring a waiver would be unjust.

(B) Failure to comply

The President may decline to offer a settlement to a potentially responsible party under this subsection if the President determines that the potentially responsible party has failed to comply with any request for access or information or an administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action with respect to the facility.

(C) Responsibility to provide information and access

A potentially responsible party that enters into a settlement under this subsection shall not be relieved of the responsibility to provide any information or access requested

in accordance with subsection (e)(3)(B) of this section or section 9604(e) of this title.

(9) Basis of determination

If the President determines that a potentially responsible party is not eligible for settlement under this subsection, the President shall provide the reasons for the determination in writing to the potentially responsible party that requested a settlement under this subsection.

(10) Notification

As soon as practicable after receipt of sufficient information to make a determination, the President shall notify any person that the President determines is eligible under paragraph (1) of the person's eligibility for an expedited settlement.

(11) No judicial review

A determination by the President under paragraph (7), (8), (9), or (10) shall not be subject to judicial review.

(12) Notice of settlement

After a settlement under this subsection becomes final with respect to a facility, the President shall promptly notify potentially responsible parties at the facility that have not resolved their liability to the United States of the settlement.

(h) Cost recovery settlement authority

(1) Authority to settle

The head of any department or agency with authority to undertake a response action under this chapter pursuant to the national contingency plan may consider, compromise, and settle a claim under section 9607 of this title for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further action. In the case of any facility where the total response costs

exceed $500,000 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

(2) Use of arbitration

Arbitration in accordance with regulations promulgated under this subsection may be used as a method of settling claims of the United States where the total response costs for the facility concerned do not exceed $500,000 (excluding interest). After consultation with the Attorney General, the department or agency head may establish and publish regulations for the use of arbitration or settlement under this subsection.

(3) Recovery of claims

If any person fails to pay a claim that has been settled under this subsection, the department or agency head shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount of such claim, plus costs, attorneys' fees, and interest from the date of the settlement. In such an action, the terms of the settlement shall not be subject to review.

(4) Claims for contribution

A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(i) Settlement procedures

(1) Publication in Federal Register

At least 30 days before any settlement (including any settlement arrived at through arbitration) may become final

under subsection (h) of this section, or under subsection (g) of this section in the case of a settlement embodied in an administrative order, the head of the department or agency which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed settlement. The notice shall identify the facility concerned and the parties to the proposed settlement.

(2) Comment period

For a 30-day period beginning on the date of publication of notice under paragraph (1) of a proposed settlement, the head of the department or agency which has jurisdiction over the proposed settlement shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.

(3) Consideration of comments

The head of the department or agency shall consider any comments filed under paragraph (2) in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

(j) Natural resources

(1) Notification of trustee

Where a release or threatened release of any hazardous substance that is the subject of negotiations under this section may have resulted in damages to natural resources under the trusteeship of the United States, the President shall notify the Federal natural resource trustee of the negotiations and shall encourage the participation of such trustee in the negotiations.

(2) Covenant not to sue

An agreement under this section may contain a covenant not to sue under section 9607(a)(4)(C) of this title for dam-

ages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

(k) Section not applicable to vessels

The provisions of this section shall not apply to releases from a vessel.

(*l*) Civil penalties

A potentially responsible party which is a party to an administrative order or consent decree entered pursuant to an agreement under this section or section 9620 of this title (relating to Federal facilities) or which is a party to an agreement under section 9620 of this title and which fails or refuses to comply with any term or condition of the order, decree or agreement shall be subject to a civil penalty in accordance with section 9609 of this title.

(m) Applicability of general principles of law

In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this chapter shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements.

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3152

ATLANTIC RESEARCH CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF OF THE APPELLEE

Of Counsel:

LTC MICHAEL D. GRAHAM
Environmental Law Division
U.S. ARMY LEGAL SERVICES AGENCY
901 N Stuart St. Suite 400
Arlington, VA 20003-1867

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
ENVIRONMENT & NATURAL RESOURCES DIVISION
GREER S. GOLDMAN
MICHELLE WALTER
RONALD M. SPRITZER
Attorneys, U.S. Department of Justice
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026
(202) 514-3977

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* * * *

886A (1979). Accord *Pinal Creek Group*, 118 F.3d at 1301-03 (and cases cited therein); *Matter of Reading*, 115 F.3d at 1121; *United Techs.*, 33 F.3d at 99; *Amoco Oil Co.*, 889 F.2d at 672.

ARC seeks to reapportion costs between PRPs, and accordingly its claim is necessarily for contribution and is governed by section 113(f).

C. The Second Circuit's recent decision in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.* does not support ARC's contribution theory and, in any event, that decision is contrary to controlling authority in this Circuit and

is unpersuasive. ARC relies on the Second Circuit's recent decision in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005). Br. 19-23. ARC mistakenly claims that Consolidated Edison authorizes "contribution claims by PRPs such as ARC." Br. 27-28. In fact, the Second Circuit decision squarely rejected the contribution claim advanced by the plaintiff PRP because it had not resolved its CERCLA liability under CERCLA section 113(f)(3)(B). 423 F.3d at 95-97. What the Second Circuit actually held is that section 107(a)(4)(B) permits a PRP that has not been sued or made to participate in an administrative proceeding to bring a claim for recovery of all of its necessary response costs from other PRPs. See 423 F.3d at 99-102 & n.9.[20] That holding is contrary to *Dico*. ARC agrees that *Dico* "held that CERCLA limits actions between PRPs to contribution" and prohibits PRPs from bringing a "full cost recovery" action. Br. at 16, 28. ARC has not argued that this Court should reevaluate that aspect of *Dico*.[21] ARC agrees that "[s]ettled precedent and common sense dictate that a PRP that has some liability for response costs cannot hold another party jointly and severally liable for 100% of the response costs the PRP has incurred." Br. 29. There is thus no need for this Court to determine whether *Consolidated Edison* was correctly decided because ARC has not asked the Court to overrule *Dico*'s holding that one PRP cannot sue another for full recovery of its response costs.

In any event, *Consolidated Edison* does not provide a persuasive basis for overruling *Dico*. The Second Circuit ac-

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[20] The defendants would have to file a counterclaim for contribution to avoid paying all of the plaintiff PRP's necessary costs. *Id.* at n.9.

[21] We note that, if this Court were to reconsider that binding Circuit authority, then it would also need to consider an additional matter that *Dico* did not need to reach—whether section 107(a)(4)(B) would provide a right of cost recovery to persons who have not received express authorization to undertake CERCLA response activities.

knowledged decisions of other courts of appeals holding that claims for allocation of CERCLA liability between PRPs are necessarily contribution claims and are governed by section 113(f), as well as its own decision in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), that had reached the same result. 423 F.3d at 99, 102-03. Nevertheless, the court in *Consolidated Edison* concluded that those decisions were no longer valid, primarily because of the Supreme Court's statement in *Aviall* that the cost recovery remedy provided by section 107(a) and the contribution remedy provided by section 113(f)(1) are "'clearly distinct.'" 423 F.3d at 99 (quoting *Aviall*, 125 S. Ct. at 582 n.3).[22]

In fact, the courts of appeals decisions limiting PRPs to contribution claims under section 113(f) recognized that the remedies provided by that provision and section 107(a) are distinct. *E.g.*, *New Castle County*, 111 F.3d at 1120; *Redwing Carriers*, 94 F.3d at 1496 n.7; *United Techs.*, 33 F.3d at 100. Nevertheless, those courts held that, of the two distinct remedies, the appropriate remedy for allocation claims between PRPs was a contribution claim governed by section 113(f).[23] *Aviall* does not cast any doubt on the well-established principles underlying *Dico* and the other courts of appeals decisions cited in *Consolidated Edison*. The argument that it does incorrectly assumes that the courts of appeals disallowed actions by private PRPs under section 107(a)(4)(B) *only* because they assumed that *all* private PRPs who had incurred response costs could use 113(f) to seek contribution. Although *Aviall* resolved the question whether a "volunteer" PRP may seek contribution under section 113(f)(1), it did

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[22] This undercuts ARC's theory that sections 107(a)(4)(b) and 113(f) provide overlapping, independent contribution remedies.

[23] Unsurprisingly, the Second Circuit in *Consolidated Edison* acknowledged that its interpretation of sections 107 and 113 conflicts with the First Circuit's decision in *United Techs.* and the Ninth Circuit's decision in *Pinal Creek*. 423 F.3d at 99-100, 103.

nothing to change the fundamental assumption that underlies the courts of appeals cases: that claims by private PRPs are *necessarily* actions for contribution, which *must* be brought using the express limited mechanisms that Congress provided in section 113(f). Not only did the Supreme Court in *Aviall* expressly decline to address the correctness of the then-unanimous decisions by ten courts of appeals that a PRP may not bring an action against another PRP under section 107(a)(4)(B), 125 S. Ct. at 585-86, nothing in the Court's analysis calls those decisions into question.

The Second Circuit's ruling in *Consolidated Edison* is also wrong because it frustrates the incentives provided by Congress to encourage PRPs to promptly settle their liability with EPA or a State. In *Bedford Affiliates*, the Second Circuit noted that if it permitted PRPs to elect recovery under either section 107(a) or 113(f)(1), "[a] recovering liable party would readily abandon a § 113(f)(1) suit in favor of the substantially more generous provisions of § 107(a)." 156 F.3d at 424. That is precisely the incentive the *Consolidated Edison* ruling creates. A PRP that has *not* been sued under section 106 or 107 would be better off not settling its liability with EPA or a State so that it could claim to be a "volunteer" and sue under the "substantially more generous provisions of § 107(a)."

Finally, the Second Circuit erred by reading section 107 (a)(4)(B) in isolation. In particular, the Second Circuit's construction is inconsistent with the contribution protection provided by section 113(f)(2), 42 U.S.C. 9613(f)(2). As explained *supra* at 44, if a PRP were allowed to avoid section 113(f) and seek reimbursement solely under section 107 a)(4)(B) from a PRP that had settled earlier, it is at best unclear whether section 113(f)(2) would afford contribution protection to the settling party. See *Matter of Reading*, 115 F.3d at 1119. "[T]hat would throw a proverbial monkey wrench into the works," because "[c]onsent agreements would no longer provide protection, and settling parties would have

to endure additional rounds of litigation to apportion their losses." *Id.* Accordingly, the Second Circuit's decision to allow certain PRPs full recovery under section 107(a)(4)(B) is inconsistent with CERCLA's settlement scheme and should be rejected here.

Supreme Court, U.S.
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No. 05-1323

IN THE

Supreme Court of the United States

UGI UTILITIES, INC.,
Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

RICHARD W. BABINECZ
ASSOCIATE GENERAL COUNSEL AND GENERAL ATTORNEY
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
4 Irving Place
New York, NY 10003-3502
(212) 460-2477

* Counsel of Record

WOODY N. PETERSON *
DAVID L. ELKIND
ANDREW C. COOPER
JOSEPH R. BERGER
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037-1526
(202) 785-9700

Attorneys for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

COUNTERSTATEMENT OF QUESTION PRESENTED

Last Term, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), this Court found it "prudent to withhold judgment" (*id.* at 170) on an array of issues involving §§ 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), principally because none of the issues had been raised or considered below.

The question presented is:

Whether the Court should take up questions reserved in *Aviall* by reviewing the lone post-*Aviall* court of appeals decision, a decision that reached only one of the questions, answered that question *sua sponte*, and did not "confront the relationship between §§ 107 and 113" (*Aviall*, 543 U.S. at 170).

RULE 29.6 STATEMENT

Respondent Consolidated Edison Company of New York, Inc. is a wholly owned subsidiary of Consolidated Edison, Inc. No other publicly held corporation owns 10% or more of respondent's stock.

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IN THE

Supreme Court of the United States

No. 05-1323

UGI UTILITIES, INC.,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

STATUTES INVOLVED

The last sentence of the "Statutes Involved" section of petitioner UGI Utilities, Inc.'s ("UGI") petition (at 4) notes that the statutes involved, CERCLA §§ 107 and 113, 42 U.S.C. §§ 9607 and 9613, are set out in the appendix to the petition at 103a-142a. The remainder of the section essentially consists of statutory exegesis and argument that do not comport with the requirements of Rule 14(1)(f) of this Court. Respondent Consolidated Edison Company of New York, Inc. ("Con Edison") therefore does not respond to them.

COUNTERSTATEMENT OF THE CASE

The facts are as stated in the opinion of the court of appeals (Pet. 2a-4a). As the opinion notes, Con Edison's First Amended Complaint rests solely on § 113(f)(1), and seeks to

recover from UGI a portion of the costs Con Edison incurred in cleaning up environmental contamination. (Pet. 4a, 25a.) The case was briefed and argued in the district court and the court of appeals on the § 113(f)(1) jurisdictional basis.

After this Court's *Aviall* decision came down, the court of appeals asked the parties to file supplemental briefs on the question whether the court continued to have jurisdiction. UGI asserted that jurisdiction no longer attached; Con Edison contended that jurisdiction continued to exist under § 113(f)(3)(B). (Pet. 7a.) Neither party briefed any issue arising under § 107, as both assumed *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), foreclosed such a claim.

The court of appeals rejected the parties' arguments, distinguished the case from *Bedford Affiliates*, and, in answer to one of the § 107 questions reserved in *Aviall*, concluded that a person potentially responsible for environmental contamination ("PRP") that voluntarily cleans up the contamination on its own initiative can pursue a cost recovery claim under § 107(a). The Second Circuit did not decide any of the other open *Aviall* issues, nor address the "significant issue" of the relationship between §§ 107 and 113 (*Aviall*, 543 U.S. at 169).

The court of appeals remanded the case to the district court for further proceedings. Con Edison has not yet amended its complaint in the district court to state a § 107 claim, nor decided whether "to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery)" (*Aviall*, 543 U.S. at 170-71), or in some other fashion.

REASONS FOR DENYING THE PETITION

I. NO ISSUE RESERVED IN *AVIALL* WAS RAISED BELOW

In *Aviall*, the Court flagged a host of § 107 and § 113 questions that had not been raised or decided below: whether a party potentially liable under CERCLA (1) can recover costs under § 107(a)(4)(B); (2) can pursue a § 107(a) action for joint and several liability; (3) can pursue a cost recovery action under § 107(a) for some form of liability other than joint and several; (4) has an express or implied right of contribution under § 107; and (5) has "any judicially implied right of contribution [that] survived the passage of SARA." 543 U.S. at 168-71. The Court also cited the relationship between § 107 and § 113 as "a significant [undecided] issue in its own right." *Id.* at 169. Concluding that these issues "merit full consideration by the courts below," the Court remanded them to the Fifth Circuit. *Id.* at 169, 171.[1]

In *Aviall*, neither the district court, the panel, nor the en banc court reached any § 107 question, either because Aviall had not pressed a § 107 claim in the first instance or had waived it, or because it was unnecessary to reach a § 107 claim regardless of whether it was presented. *Aviall*, 543 U.S. at 168. The Second Circuit's decision here comes to this Court in much the same posture on the merits as the Fifth Circuit's decision did. Indeed, the only difference between them is that the Second Circuit considered one of the questions reserved in *Aviall*.

The Second Circuit did not take up the other *Aviall* questions for procedural reasons somewhat analogous to those that resulted in the Fifth Circuit's not reaching any

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[1] The Fifth Circuit in turn remanded the case to the District Court for the Northern District of Texas, which presently has motions for partial summary judgment on these issues under advisement.

of them. In the present case, Con Edison based its First Amended Complaint only on § 113(f)(1), on the theory that *Bedford Affiliates* foreclosed a concurrent § 107 claim. *Aviall* was decided after the district court below had ruled and the parties had submitted their briefs to the Second Circuit. The court of appeals subsequently directed the parties to file supplemental briefs addressing the impact of *Aviall* upon Con Edison's § 113(f)(1) claim. The parties did not brief any § 107 issue, on the incorrect assumption that the court of appeals' pre-*Aviall* decision in *Bedford Affiliates* precluded the panel from revisiting § 107. The Second Circuit's decision below accordingly addressed only one of the § 107 questions left open in *Aviall*.[2] These issues remain in flux in the Second Circuit.[3]

To be sure, the questions left unanswered in *Aviall* are important, as was the one the Court did decide. But that is no reason for the Court to deviate from its ordinary course of not deciding "'in the first instance issues not decided below.'"

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[2] UGI effectively concedes as much. (Pet. 18.) Indeed, UGI cites the court of appeals' failure to reach and decide these questions as a reason why this Court should decide them (*id.*), a course the Court expressly declined to follow in *Aviall*. To the extent UGI also invites the Court to review issues UGI suggests were implicitly or impliedly decided by the court of appeals, the Court should decline that invitation as well. *Cf. Aviall*, 543 U.S. at 170 ("'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' *Webster v. Fall*, 266 U.S. 507, 511 (1925).").

[3] For example, in *Syms v. Olin Corp.*, 408 F.3d 95, 106-07 (2d Cir. 2005), the Second Circuit declined to determine whether the rule announced in *Bedford Affiliates* remained viable after *Aviall*. The parties had not fully briefed or argued the impact of *Aviall* on *Bedford Affiliates*, and the court of appeals concluded that the best course was to allow the district court to address the issue in the first instance. *Id.* at 107; *see also Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, No. 95-CV-6400L, 2006 WL 1030321, at *4 (W.D.N.Y. Apr. 20, 2006) (noting that "the waters in this area still remain somewhat murky" in the Second Circuit).

Aviall, 543 U.S. at 168-69 (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam)).

With the judgment below coming to the Court in this analytical and procedural posture, it remains "more prudent" to "withhold judgment on these matters." *Aviall*, 543 U.S. at 170. Denial of the petition would allow *Aviall* itself to proceed in the normal remand course through the district court and the court of appeals. *See, e.g., Adarand*, 534 U.S. at 105-07, 110-11 (tracing the remand route followed in a case involving a racial classification issue "of fundamental national importance calling for final resolution by this Court"). Such an approach likewise would allow these questions to be given "full consideration" (*Aviall*, 543 U.S. at 169) by the various courts of appeals which now or soon will have the issues before them.[4] Perhaps most importantly, it would permit this Court to play its role as "'a court of final review and not first view.'" *Adarand*, 534 U.S. at 110 (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part)).

II. NO POST-*AVIALL* CIRCUIT CONFLICT EXISTS

This Court decided *Aviall* less than eighteen months ago. It is thus not surprising that only one court of appeals—the Second Circuit—has had an opportunity to consider the many questions left open in *Aviall*, and even that court addressed but one of them.

All of the cases UGI cites for the proposition that there is a circuit split (Pet. 10-11) were reached before this Court's decision in *Aviall*, and four of them are currently being

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[4] Further examination of these issues by the lower courts would be particularly beneficial given the "miasmatic" nature of CERCLA's provisions. *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 326 (2d Cir. 2000).

revisited by the respective court of appeals. The questions are *sub judice* before the Eighth and the Third Circuits,[5] and in the briefing stage in the Seventh and the Ninth Circuits.[6]

Moreover, as the Second Circuit found, the cases to which UGI points are in any event inapposite, because they "considered plaintiffs that [unlike Con Edison] had either been held liable—or, because they had been sued, might imminently be held liable—under an administrative or court order or judgment." (Pet. 20a.)[7] Finally, all but two of the post-

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[5] *Atl. Research Corp. v. United States*, No. 05-3152 (8th Cir. filed Aug. 8, 2005) (argued Mar. 16, 2006); *E.I. DuPont de Nemours & Co. v. United States*, No. 04-2096 (3d Cir. filed Apr. 27, 2004) (argued Apr. 17, 2006).

[6] *N. Am. Galvanizing & Coatings, Inc. v. Metro. Water Reclamation Dist. of Greater Chicago*, No. 05-3299 (7th Cir. filed Aug. 8, 2005) (argued Jan. 20, 2006); *City of Rialto v. U.S. Dep't of Def.*, No. 05-56749 (9th Cir. filed Nov. 22, 2005); *Kotrous v. Goss-Jewett Co. of N. Cal., Inc.*, No. 06-15162 (9th Cir. filed Feb. 1, 2006).

[7] The Second Circuit did view its conclusion as at odds with the Ninth Circuit's pre-*Aviall* decision in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), but it is unclear if that is in fact the case. Of the eight post-*Aviall* district court decisions in the Ninth Circuit, six have ruled that *Pinal Creek* does not pose an obstacle to a § 107 claim by a PRP. *See* the four Ninth Circuit cases cited at Pet. 28 & n.15; *Sunnyside Dev. Corp. v. Opsys U.S. Corp.*, No. C 05-01447 SI, 2006 WL 1128039 (N.D. Cal. Apr. 27, 2006); *McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114, 1133 (D. Or. 2006). The court in *Adobe Lumber, Inc. v. Hellman* thought that *Pinal Creek* may well preclude such a § 107 claim, but declined to dismiss plaintiff's claim for contribution, because the court had "difficulty imagining that the Ninth Circuit would prevent PRPs from pursuing contribution claims for clean up costs incurred voluntarily." 415 F. Supp. 2d 1070, 1078-79 (E.D. Cal. 2006), *petition for permission to appeal granted*, No. 06-80026 (9th Cir. May 26, 2006). Only *City of Rialto v. United States Department of Defense*, No. EDCV 04-00079-VAP (SSx), 2005 U.S. Dist. LEXIS 26941 (C.D. Cal. Aug. 16, 2005), relied on *Pinal Creek* to reject a § 107 contribution claim by a PRP. *City of Rialto* is on appeal to the Ninth Circuit, which will decide if *Pinal Creek* ever was at odds with the ruling below and, if so, whether it should remain so in light of *Aviall*.

Aviall district court decisions cited by UGI have reached the same conclusion as the Second Circuit did here. (*See* Pet. 27, 28 & n.15.) The other two district courts found that they could not reach the issue, given existing pre-*Aviall* precedent analogous to *Bedford Affiliates* in their respective circuits. (*See* Pet. 28.)

When only one court of appeals has reached any issue left open in *Aviall*, there by definition can be no "split" in the circuits, let alone one worthy of this Court's attention at this early juncture.[8]

III. NO EXCEPTIONAL CIRCUMSTANCE SUPPORTS REVIEW

As shown in Parts I and II, no question left open in *Aviall* was raised below, the court of appeals reached only one, and did so *sua sponte*, and there is no circuit conflict. Moreover, not even UGI asserts that any "exceptional circumstance" warrants deviation from the Court's settled rule of not resolving in the first instance issues not decided below. *Aviall*, 543 U.S. at 168-69. Indeed, here, as in *Aviall*, "the circumstances . . . cut *against* resolving the § 107 claim." *Id.* at 169.[9]

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[8] In light of the state of pre-*Aviall* law, and the posture of post-*Aviall* litigation in the various circuits, the Second Circuit's decision hardly "risks disrupting the settled CERCLA construction in every other circuit" and creating "nationwide uncertainty" (Pet. 10, 25). The other circuits in any event will make their own decisions independently, just as they would have if the Second Circuit had ruled otherwise, or not at all.

[9] Even if these considerations governing review on certiorari did not weigh heavily against granting the petition, but were in equipoise, the federal government's litigation tactics in cases in which it has been sued as a PRP (*see* Pet. 22-25) would not tip the scales the other way. These cases arise because "[m]uch of the worst pollution in the United States emanates from facilities owned and operated by the federal government." J.B. Wolverton, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes*, 15 Harv.

We therefore do not extend this brief by responding to petitioner's arguments as to why the court of appeals' ruling on the issue it did reach was erroneous.[10] We likewise do not engage in the *Alice in Wonderland* exercise of defending the Second Circuit from UGI's attacks on analyses the court of appeals never undertook, rationales it never embraced, or answers it never gave to questions it never reached. (*See, e.g.*, Pet. 13-18 (taking the Second Circuit to task over such issues).) We instead confine ourselves here to a portion of Justice Ginsburg's dissent in *Aviall*:

> In *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994), all Members of this Court agreed that § 107 of [CERCLA] "unquestionably provides a cause of action for [potentially responsible persons (PRPs)] to seek recovery of cleanup costs." The Court rested that determination squarely and solely on § 107(a)(4)(B), which allows *any* person who has incurred costs for cleaning up a hazardous waste site to recover all or a portion of those costs from any other person liable under CERCLA.
>
> The *Key Tronic* Court divided, however, on the question whether the right to contribution is implicit in

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Envtl. L. Rev. 565, 565 (1991). For that reason, when the federal government is a polluter, it enjoys no sovereign immunity and is no different from any other PRP under CERCLA. *See, e.g., FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833, 840 (3d Cir. 1994).

That the government as a PRP defendant has chosen to argue that contribution rights should be restricted is thus no more surprising, and entitled to no more attention, than the fact that private PRPs like UGI have done so. In fact, it may be even less remarkable if, as has been suggested, the government's tactics in such cases are part of a broader litigation strategy designed to avoid paying cleanup costs altogether. *See* Brief of Amicus Curiae United States Chamber of Commerce § III(B), *Raytheon Aircraft Co. v. United States* (D. Kan. Feb. 24, 2006) (No. 05-2328 JWL), Toxics L. Rep. (BNA) 239, 245-46 (Mar. 2, 2006).

[10] Should the Court grant the petition, Con Edison will rebut these contentions fully and at length in its brief on the merits.

> § 107(a)'s text, as the majority determined, or whether § 107(a) expressly confers the right, as the dissenters urged. . . . But no Justice expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred.

Aviall, 543 U.S. at 172 (Ginsburg, J., dissenting) (second alteration in original) (footnote omitted).

We do not quote the above passage to argue that the views there expressed commanded a majority of the Court or disposed of the question the Second Circuit did decide. Rather, we do so because the views alone suffice to refute petitioner's contention that the Second Circuit's ruling on the § 107(a)(4)(B) issue departs so far from the statutory text and this Court's jurisprudence that this Court must immediately intervene to prevent other courts of appeals from considering this, and the other outstanding *Aviall* issues, in the ordinary course.

CONCLUSION

The petition should be denied.

Respectfully submitted,

RICHARD W. BABINECZ
ASSOCIATE GENERAL COUNSEL
AND GENERAL ATTORNEY
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
4 Irving Place
New York, NY 10003-3502
(212) 460-2477

WOODY N. PETERSON *
DAVID L. ELKIND
ANDREW C. COOPER
JOSEPH R. BERGER
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, NW
Washington, DC 20037-1526
(202) 785-9700

* Counsel of Record

Attorneys for Respondent

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No. 05-1323

IN THE

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UGI UTILITIES, INC.,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON*
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

*Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

RULE 29.6 STATEMENT

The Rule 29.6 Statement in the petition is current.

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BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The CERCLA § 107(a)[1] issues presented in this and two other pending cases are currently being litigated across the Nation, principally in cases involving private party defendants like petitioner. Complete and expeditious resolution of the issues can best be accomplished by granting the petitions for a writ of certiorari in this case and in *E.I. du Pont de Nemours & Co.* v. *United States*, No. 06-726 (filed Nov. 21, 2006) (*DuPont*), as the government suggests, and consolidating those cases for oral argument.

The United States concedes (Br. for U.S. as Amicus Curiae at 8 (U.S. Br.)) that "there is a clear conflict among the courts of appeals on the issue" presented in this case and that the Court should resolve the conflict this Term "to end the ongoing uncertainty in the lower courts" (Br. for the Resp'ts at 14, *Du Pont* (No. 06-726)). The United States contends, however, that this case, which created the circuit conflict and ongoing uncertainty, is a less suitable vehicle than the two cases in which it is the PRP-defendant, *DuPont* and *United States* v. *Atlantic Research Corp.*, No. 06-562 (filed Oct. 24, 2006) (*Atlantic Research*). U.S. Br. at 10.

But the petition in *DuPont* presents a narrower issue than the one presented here. *Atlantic Research*, which the government has stated need not be reviewed to resolve the circuit conflict (Br. for the Resp'ts at 13, *DuPont* (No. 06-726)), is not yet ripe for consideration and in the ordinary course would delay argument until next Term. The *Atlantic Research* petition, moreover, seeks review of an Eighth Circuit decision that followed the reasoning of the Second Circuit in this case.

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[1] Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a).

Granting the petitions in this case and in *DuPont* will ensure complete vetting of the issues by affording the government a full opportunity to advance its position that § 107(a) does not provide PRP remedies against the United States, as well as affording petitioner the opportunity to challenge the Second Circuit's decision that § 107(a) provides a cost recovery remedy to PRPs, like respondent, that lack a CERCLA contribution remedy.

1. This case and *DuPont* are complementary; in combination they present for review the full range of proposed § 107(a) remedies. The court of appeals held that § 107(a)'s cost recovery remedy affords a PRP the right to recover "100 percent of its costs from other [PRPs]." Pet. App. 15a n.9. *DuPont* addresses—and rejects—the narrower claim that pursuant to § 107(a) "the Government [as PRP] must contribute to [DuPont] a share of the cleanup costs." Supp. Br. App. 2a (*E.I. du Pont de Nemours & Co.* v. *United States*, 460 F.3d 515, 518 (3d Cir. 2006)). DuPont's petition is similarly limited only to the question of whether § 107(a) or federal common law allows PRPs to recover from other PRPs "an equitable share of its cleanup costs." Petition for Writ of Certiorari at i, *DuPont* (No. 06-726).

The petition in this case should be granted along with the *DuPont* petition to ensure that the broader cost recovery right the Second Circuit found in § 107(a) is fully presented and resolved. Resolution of only the more limited contribution right that DuPont asks the Court to find in § 107(a) or federal common law would potentially leave open whether § 107(a) affords PRPs a cause of action to recover all of their cleanup costs and would therefore not resolve completely the conflict among the lower courts.

This case further complements *DuPont* because in this case a private party, rather than the government, is the PRP defendant. Courts and PRPs have suggested that the government's "dual role" both as CERCLA's primary enforcer and as a sometimes liable party supports holding that CERCLA af-

fords PRPs a remedy against the government when it is a PRP. Supp. Br. App. 77a (*Atlantic Research* v. *United States*, 459 F.3d 827, 837 (8th Cir. 2006)); Petition for Writ of Certiorari at 24-25, 27-28, *DuPont* (No. 06-726). Seeking to strip the government of its perceived ability to control PRP actions against it, the Eighth Circuit created a PRP remedy that does not depend, as does CERCLA's § 113(f)[2] contribution remedy, on either a government enforcement action or a settlement with the government. Supp. Br. App. 76a-77a (*Atlantic Research*, 459 F.3d at 836-37).

DuPont's petition also champions this approach, arguing that creation of a statutory or federal common law right to recover from the United States its equitable share of cleanup costs is necessary to ensure that the United States, which unlike private PRPs cannot be sued under state law, will not be able to avoid cleanup liability by refusing to sue or settle with a PRP. Petition for Writ of Certiorari at 24-25, 27-28, *DuPont* (No. 06-726). Given this rationale, if, contrary to the positions of petitioner and the United States, such a remedy exists, it should not encompass suits against private defendants, like UGI, that have no "dual role." Because *DuPont*, like *Atlantic Research*, only involves claims against the government, the Court's consideration of whether federal law affords PRPs cost recovery or contribution claims would benefit from reviewing this case involving a private party defendant, in addition to *DuPont*.

2. The Second Circuit's rejection of respondent's § 113(f)(3)(B) contribution claim is no impediment to this Court's review of the § 107(a) issue. The government suggests that this case presents a "less suitable vehicle" than either *DuPont* or *Atlantic Research* because respondent might argue, although it has not thus far, that the Second Circuit erred in holding that it lacks a contribution remedy under § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B). Such an argu-

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[2] 42 U.S.C. § 9613(f).

ment, the government contends, would "effectively constitute[] an alternative ground for affirmance of the court of appeals' decision" (U.S. Br. at 11), and might be a "predicate to an intelligent resolution" (*id.* (quotation marks omitted)) of the § 107(a) issue.

The government's suggestion, however, is premised on a misunderstanding of the Second Circuit's holding. Because the court of appeals' § 107(a) remedy is broader than the relief available under § 113(f)(3)(B), the court of appeals' judgment cannot be affirmed on § 113(f)(3)(B) grounds. Section 107(a) provides a claim for all incurred response costs, a vehicle for shifting the entire cleanup burden to another PRP. In contrast, § 113(f)(3)(B) affords only a contribution remedy and requires courts to allocate response costs among liable parties using "equitable factors." *See* 42 U.S.C. § 9613(f)(1). Even if petitioner is entitled to contribution counterclaims, the Second Circuit's § 107(a) claim potentially allows respondent to recover substantially more than its equitable share because it may succeed in shifting the burden of proof on allocation issues as well as shifting the liability for orphan shares. *See* Pet. 16.

It is for these reasons (as well as the different limitations periods for § 107(a) and § 113(f) claims) that other courts of appeals, including the Third Circuit, have concluded that allowing PRPs to use § 107(a) "would render section 113 a nullity," *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997), because PRPs "would quickly abandon section 113 in favor of the substantially more generous provisions of section 107," *id.*—just as respondent apparently has done here. Therefore, § 113(f)(3)(B) cannot provide an alternative ground for affirmance of the court of appeals' judgment, and, given the more robust relief potentially available under § 107(a), the first step in the analysis is whether PRPs are entitled to that

section's remedy.[3] *See Schaefer* v. *Town of Victor*, 457 F.3d 188, 202 n.19 (2d Cir. 2006) (refusing to decide whether PRP could bring a § 113(f)(3)(B) claim because PRP could bring a claim under § 107(a)).

3. The Second Circuit's holding that § 107(a) expressly provides PRPs the right of cost recovery, rather than an implied contribution right, does not make this a less suitable vehicle to consider the § 107(a) issues. The United States also suggests that this case may present a less suitable vehicle than *DuPont* or *Atlantic Research* because the Second Circuit held that § 107(a) expressly provides PRPs a cost recovery claim and did not address the "subsidiary question" (U.S. Br. at 13) of whether § 107(a) contains an implied contribution right.

To the extent that any implied right of contribution is simply an alternative rationale to provide PRPs a cost recovery remedy based on CERCLA's text, structure or history, it is subsumed in the court of appeals' judgment from which petitioner seeks review. *See* Pet. at 12-17. Even if the implied

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[3] As the petitions in the pending cases make clear, deciding whether § 107(a) affords PRPs a right to recover costs from other PRPs will inevitably involve consideration of the PRP contribution remedy Congress provided in § 113(f). The court of appeals' attempt to limit its newly-coined cost recovery claim to "voluntary" PRPs—i.e., PRPs lacking a § 113(f) contribution remedy—underscores that inevitability. *See* Pet. 11a-21a; *see also* Supp. Br. App. 76a (*Atlantic Research*, 459 F.3d at 836-37) ("liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113").

Also, even if respondent attempts to pursue the narrower § 113(f)(3)(B) remedy, the Court could dispatch it without additional burden. An administrative settlement gives rise to a § 113(f)(3)(B) contribution claim only when, as the section expressly provides, the party has "resolved its liability to . . . a State . . . in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B). The Voluntary Cleanup Agreement on which respondent relied makes no mention of resolving CERCLA claims and instead expressly reserves to the state enforcement agency the right to bring such claims in the future. Pet. App. 9a-10a.

remedy the government describes is a separate cause of action (and therefore has been forfeited by respondent), the deficiency (if it is one) is easily remedied by considering this case in tandem with *DuPont*, since that case lacks the cost recovery issue presented here and the government does not dispute that the implied contribution claim has there been preserved.

* * * *

All issues implicated by the question of whether PRPs that lack a § 113(f) contribution claim can recover cleanup costs under federal law from private and governmental PRPs are squarely presented by this case and *DuPont*. In order to resolve the obvious circuit conflict, avoid further costly litigation in the lower courts, and consider those issues in a more complete context, the petitions for review in this case and in *DuPont* should be granted and the cases consolidated for oral argument.

Respectfully submitted,

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON
Counsel of Record
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

Attorneys for Petitioner

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No. 05-1323

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SUPPLEMENTAL BRIEF FOR PETITIONER

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON*
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

*Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

RULE 29.6 STATEMENT

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APPENDIX A 1a

E.I. DuPont de Nemours & Co. v. *United States*, No. 04-2096, 2006 WL 2474339 (3d Cir. Aug. 29, 2006)

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Atlantic Research Corp. v. *United States*, No. 05-3152, 2006 WL 2321185 (8th Cir. Aug. 11, 2006)

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SUPPLEMENTAL BRIEF FOR PETITIONER

Decisions since petitioner filed its reply brief, most notably a decision of the Third Circuit on August 29, 2006, leave no doubt that there is a genuine and intolerable circuit split on the important federal law issue presented. The Third Circuit has now explicitly rejected the Second Circuit's decision in this case, adhering instead to precedents in that Circuit and others holding that a party potentially responsible for environmental cleanup costs cannot recover those costs from other potentially responsible parties (PRPs) under § 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a)(4)(B).

The Eighth Circuit, in contrast, has joined the Second Circuit in holding that PRPs can recover under § 107(a)(4)(B) and that *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004)—a decision in which the Court expressly declined to reach the issue—nullifies the contrary precedents. District courts around the country have issued decisions on both sides of the split.[1]

1. Recent conflicting decisions from the Third and Eighth Circuits make clear that there is a square and irreconcilable circuit split on the important issue presented. The Third Circuit has rejected the decision below and held that a PRP cannot recover cleanup costs from other PRPs under CERCLA § 107(a), even if the party incurred those costs voluntarily. *See* Supp. Br. App. 2a-3a, 23a, 49a (*E.I. DuPont de Nemours & Co.* v. *United States*, 2006 WL 2474339, at *1, *11, *22 (3d Cir. Aug. 29, 2006)). In so holding, the Third Circuit stated, "[w]e disagree" with the Second Circuit's analysis (*id.* at 23a (*DuPont*, 2006 WL

[1] Pursuant to Rule 15.8 of this Court, petitioner files this supplemental brief to call attention to these new cases not available when petitioner filed its reply brief.

247339, at *11)), and reasoned that a "thorough review of CERCLA, as amended by SARA,[2] does not support [the Second Circuit's] conclusion" (*id.* at 45a (*DuPont*, 2006 WL 247339, at *21)).

The Third Circuit also disagreed with the Second Circuit's conclusion that *Cooper Industries* undermined previous holdings that PRPs have no § 107(a) claim, stating, "We conclude that *Cooper Industries* does not give us cause to reconsider our precedents here." *Id.* at 3a (*DuPont*, 2006 WL 247339, at *1); *see also id.* at 26a (*DuPont*, 2006 WL 247339, at *11). After reviewing CERCLA's text, purposes, history, and policies, the Third Circuit ruled directly contrary to the Second Circuit in this case, declaring, "we must refuse . . . to imply a cause of action for contribution under § 107 . . . available to PRPs engaged in *sua sponte* voluntary cleanups." *Id.* at 49a (*DuPont*, 2006 WL 247339, at *22). *Compare* Pet. App. 16a-17a. (holding that, after *Cooper Industries*, "section 107(a) permits a [liable] party that has not been sued . . . to recover necessary response costs incurred voluntarily").

Only eighteen days before the Third Circuit's *DuPont* decision, the Eighth Circuit embraced the Second Circuit's decision in this case and reinterpreted CERCLA to allow PRPs to maintain a § 107(a) claim. Supp. Br. App. 62a (*Atl. Research Corp.* v. *United States*, 2006 WL 2321185 (8th Cir. Aug. 11, 2006)). Like the Second Circuit, the Eighth Circuit concluded that, in light of *Cooper Industries*' enforcement of statutory constraints on the contribution remedy in CERCLA § 113,[3] "it no longer makes sense to view § 113 as a liable party's exclusive remedy." *Id.* at 73a (*Atl. Research*, 2006 WL 2321185, at *6); *compare* Pet. App. 14a.

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[2] The Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613.

[3] 42 U.S.C. § 9613.

Abandoning its contrary 2003 holding in *Dico, Inc.* v. *Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003), the Eighth Circuit broadened the inter-circuit rift by joining the Second Circuit in departing from previously uniform courts of appeals' precedents holding that PRPs have no § 107 remedy[4]—precedents to which the Third Circuit in *DuPont* remained faithful (Supp. Br. App. 3a (*DuPont*, 2006 WL 247339, at *1)). Observing that the Eighth Circuit's decision "relies almost entirely on the reasoning of *Consolidated Edison*" (*id.* 23a, n.18 (*DuPont*, 2006 WL 247339, at *10 n.18)), the Third Circuit rejected it, declaring, "our consideration of the Second Circuit's case applies as well to the decision of the Eighth Circuit" (*id.*).

These recent decisions thus moot respondent's misplaced suggestion (Br. in Opp'n 7) that this Court should await a post-*Cooper Industries* circuit conflict. *See* Supp. Br. App. 23a, n.18 (*DuPont*, 2006 WL 247339, at *10 n.18); *see also id.* at 47a, n.32 (*DuPont*, 2006 WL 247339, at *21, n.32) (observing of *Elementis Chromium L.P.* v. *Coastal States Petroleum Co.*, 450 F.3d 607, 613 (5th Cir. 2006), that "at least one other Circuit Court has agreed with our interpretation of § 107(a) in a case decided after *Consolidated Edison*"). The split is squarely presented.

2. Additional new authorities show that the Second Circuit's decision has created conflicting applications of CERCLA. Recent decisions remove any doubt that without a uniform national rule, inconsistent constructions of CERCLA will be the norm.

In addition to the Third and Eighth Circuit decisions, the Second Circuit recently reaffirmed its commitment to the approach taken below. *See Schaefer* v. *Town of Victor*, 457 F.3d 188, 202 (2d Cir. July 13, 2006). Meanwhile, since pe-

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[4] Supp. Br. App. 70a (*Atl. Research*, 2006 WL 2321185, at *4) ("We now see that *Aviall* undermines *Dico*, and the judge-created analytic upon which it relies.").

titioner filed its reply brief, district courts have continued to struggle with the issue, yielding inconsistent results. On remand, the *Cooper Industries* district court denied the plaintiff-PRP's § 107(a) claim. *Aviall Servs., Inc.* v. *Cooper Indus., L.L.C.*, No. 3:97-CV-1926-D, 2006 WL 2263305, at *8 (N.D. Tex. Aug. 8, 2006). Another district court in the Fifth Circuit, following that Circuit's recent pronouncement in *Elementis*, also held that PRPs have no § 107(a) claim. *Columbus McKinnon Corp.* v. *Gaffey*, No. H-06-1125, 2006 WL 2382463, at *4 (S.D. Tex. Aug. 16, 2006). And, like *DuPont*, a district court in the Sixth Circuit rejected a PRP's call, based on the Second Circuit's reading of *Cooper Industries*, to abandon circuit precedent and allow it a § 107(a) contribution remedy. *See ITT Indus., Inc.* v. *Borgwarner, Inc.*, No. 1:05-CV-674, 2006 WL 2460793, at *5 (W.D. Mich. Aug. 23, 2006).[5]

In contrast, other district courts have disregarded binding precedent to create § 107(a) contribution claims for PRPs. *See City of Bangor* v. *Citizens Comms. Co.*, 437 F. Supp. 2d 180, 221 (D. Me. June 27, 2006) (holding that a responsible party may pursue a § 107(a) claim notwithstanding the contrary holding of *United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994)); *Otay Land Co.* v. *U.E. Ltd., L.P.*, No. 03CV2488, 2006 WL 2042600, at *2 (S.D. Cal. July 18, 2006) (stating that § 107(a) "provides an implied right to contribution" for PRPs, notwithstanding the holding in *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), that PRPs are limited to claims under § 113).

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[5] Underscoring *Atlantic Research*'s departure from Eighth Circuit precedent, the United States District Court for the District of Minnesota only a few weeks earlier had decided that a PRP's § 107(a) claim was foreclosed by *Dico*'s holding that PRPs cannot recover contribution under § 107(a). *Spectrum Int'l Holdings, Inc.* v. *Universal Coops., Inc.*, No. 04-99, 2006 WL 2033377, at *5 (D. Minn. July 17, 2006).

Recent developments have also shown that the CERCLA construction adopted by the Second Circuit in this case and by the Eighth Circuit in *Atlantic Research* will result in confusing and differing judicial responses across the Nation as parties dispute not only whether previously binding authorities continue to govern but also whether a particular PRP's allegations fit within a newly-minted § 107(a) contribution claim. In *Niagara Mohawk Power Corp.* v. *Consolidated Rail Corp.*, 436 F. Supp. 2d 398, 402 (N.D.N.Y. June 28, 2006), a district court in the Second Circuit denied a PRP's § 107(a) claim after concluding that, based on its facts, the action was controlled not by the decision in this case but by *Bedford Affiliates* v. *Sills*, 156 F.3d 416 (2d Cir. 1998), which held that PRPs lack § 107(a) contribution claims.

3. The Court should now settle the § 107 issue in order to eliminate the intolerable burdens that the new authorities demonstrate. Until the Court definitively resolves the question presented, PRPs deprived of § 113 contribution remedies by *Cooper Industries* will continue to attempt contribution claims under § 107(a), relying on the decision below, *Atlantic Research*, and the recent favorable district court decisions. Given the inconsistencies among lower court holdings thus far, PRPs will also look to these decisions for guidance in selecting favorable venue. *DuPont*'s facts illustrate the problem: at issue there were fifteen facilities located in the Second, Third, Fourth, Sixth, Seventh, and Tenth Circuits. Supp. Br. App. 15a n.13 (*DuPont*, 2006 WL 247339, at *7, n.13). *DuPont* presumably could have brought its § 107(a) contribution claims against the United States in districts located within nine states, including New York.[6] Absent a uniform § 107 construction, PRPs will undoubtedly race to file future cases in favorable jurisdictions, a tactic certain to create collateral litigation over proper venue, in addi-

[6] Venue for CERCLA claims lies in the districts where the site is located and where the defendant resides, may be found, or has its principal office. 42 U.S.C. § 9613(b).

tion to the difficult disputes over the availability of § 107(a) contribution claims.

The discordant holdings of the Second and Eighth Circuits also heavily burden the United States. A frequent potential PRP-defendant, the United States now faces uncertain contribution exposure: in the Third Circuit, DuPont's § 107(a) contribution claim against the United States was dismissed, but, in the Eighth Circuit, Atlantic Research's identical contribution claim was allowed to proceed.

More important is the burden that falls upon the United States as the principal CERCLA enforcer. As the Third Circuit recognized in *DuPont*, by authorizing contribution claims under § 107, the rulings of the Second and Eighth Circuits eliminate the incentives Congress, through § 113, imposed on PRPs to obtain EPA supervision of cleanups. *Id.* at 45a (*DuPont*, 2006 WL 247339, at *21). *See also* Pet. 15-16. Section 113, as *Cooper Industries* holds, authorizes a contribution claim only after a PRP is sued by, or resolves its liability to, the government. 42 U.S.C. § 9613(f)(1), (3)(B). By also affording contribution claims under § 107, the Second and Eighth Circuits allow PRPs to pursue "*sua sponte* cleanups" and avoid the admission of liability, settlement and government-approved response provided through § 113—"Congress' carefully chosen remedy" (Supp. Br. App. 45a (*DuPont*, 2006 WL 247339, at * 21)).

As the recent cases further reveal, no additional illumination of the issue presented will be gained by postponing its resolution. Whether § 107(a) affords PRPs a contribution claim is a pure question of statutory construction, and the interpretive considerations have been well studied: ten courts of appeals had resolved the question before *Cooper Industries*, and four have addressed it since. As the Third Circuit remarked, "the statute itself has not changed." Supp. Br. App. 26a (*DuPont*, 2006 WL 247339, at *12).

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The only change in the landscape is *Cooper Industries*, which altered some parties' perceptions about the scope of § 113's contribution right and suggested that § 107 and § 113 provide "clearly distinct" remedies, 543 U.S. at 163 n.3. The Second and Eighth Circuits and several district courts have found this an adequate warrant to depart from consistent prior courts of appeals' holdings that § 107 does not provide PRPs a contribution claim. The Third Circuit, several other lower federal courts, and the United States have all concluded otherwise.

The cases decided since petitioner filed its reply brief thus further highlight that there is a genuine circuit conflict on the issue presented and that the issue has broad practical consequences. It should be definitively resolved in this case.

* * * *

For the foregoing reasons and those stated in the petition and the reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON
Counsel of Record
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

Attorneys for Petitioner

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APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2096

E.I. DUPONT DE NEMOURS AND COMPANY; CONOCO, INC.; SPORTING GOODS PROPERTIES, INC.,
Appellants,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF COMMERCE; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE ARMY; UNITED STATES DEPARTMENT OF ENERGY; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES DEPARTMENT OF THE NAVY.

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 97-cv-00497
District Judge: Honorable William J. Martini

Argued: April 17, 2006
Filed: August 29, 2006

Before: SLOVITER, AMBRO and MICHEL,* *Circuit Judges*.

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* Honorable Paul R. Michel, Chief Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

OPINION OF THE COURT

AMBRO, *Circuit Judge*

Appellants in this case are owners and operators of industrial facilities located throughout the United States that are contaminated with hazardous waste. They admit they are responsible for some of the contamination at these sites (which they cleaned up voluntarily), but allege the United States Government is also responsible for some part. They thus seek a ruling that the Government must contribute to them a share of the cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*. Two of our precedents—*New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997), and *Matter of Reading Co.*, 115 F.3d 1111 (3d Cir. 1997)—limit their claim. New Castle County limits potentially responsible parties to an express cause of action for contribution under CERCLA § 113, 42 U.S.C. § 9613 (thus barring them from another type of claim called "cost recovery" under CERCLA § 107(a), 42 U.S.C. § 9607(a)).[1] Reading held that § 113 also replaced any implied or common law causes of action for contribution by potentially responsible parties with an exclusive statutory remedy.

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Supreme Court held that § 113 by its express terms is not available to parties that clean up sites voluntarily. Appellants now ask that we decide whether, in light of Cooper Industries, our decisions in New Castle County and Reading limiting contribution to § 113 should be reconsidered to allow them to clean up their sites voluntarily and still share

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[1] Because almost all relevant cases refer to the sections of CERCLA rather than the codification of those sections in the United States Code, we generally follow suit, except for the initial reference to a new section of the statute.

the costs with others. We conclude that Cooper Industries does not give us cause to reconsider our precedents here. Hence, because appellants are themselves partly responsible for the contamination at the subject sites, and their cleanups were voluntary, they may not seek contribution from other potentially responsible parties (including the Government).

I. Legal Framework

Before considering the factual background and procedural history of this case, it is necessary first to understand the applicable legal framework. In 1980, Congress enacted CERCLA to remedy the "serious environmental and health risks posed by pollution." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA is a broad remedial statute that "grants the President . . . power to command government agencies and private parties to clean up hazardous waste sites," *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994), and provides that "everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup," *Bestfoods*, 524 U.S. at 56 n.1 (emphasis and internal quotation marks omitted); *see Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 676 (3d Cir. 2003) (noting that "[t]wo of the main purposes of CERCLA are prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party" (internal quotation marks omitted)). Unfortunately, "CERCLA is not a paradigm of clarity or precision [due to] inartful drafting and numerous ambiguities attributable to its precipitous passage." *Artesian Water Co. v. Gov't of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988); *see also Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986) (noting that many CERCLA provisions are "not . . . model[s] of legislative draftsmanship," and are "at best inartful and at worst redundant"). As one court has noted, "wading through CERCLA's morass of statutory provisions can often seem as daunting as cleaning up one of the sites the statute is designed to cover." *CadleRock Props. Joint Venture, L.P. v.*

Schilberg, No. 3:01CV896, 2005 WL 1683494, at *5 (D. Conn. July 19, 2005).

This case requires us to dive head-first into a particularly convoluted area of the law: apportionment of cleanup costs among potentially responsible parties ("PRPs").[2] *See Artesian Water*, 851 F.2d at 648 (noting that CERCLA's "difficult[ies] [are] particularly apparent in the response costs area"). Several sections of CERCLA are relevant to this issue.

A. Sections 106 and 107

Under CERCLA § 106(a), 42 U.S.C. § 9606(a) the United States may take action to "secure such relief as may be necessary to abate" a "substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." CERCLA § 107(a), 42 U.S.C. § 9607(a), defines "covered persons" who are liable for these and other costs as:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a

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[2] "Potentially responsible party" and "PRP" are not used in CERCLA, but rather are terms of art used by courts and the federal Environmental Protection Agency ("EPA") to refer to parties that potentially bear some liability for the contamination of a site. *See, e.g., New Castle County*, 111 F.3d at 1120 n.2; see also *United States v. E.I. DuPont de Nemours & Co., Inc.*, 432 F.3d 161, 182-83 (3d Cir. 2005) (en banc) (Rendell, J., dissenting) (citing EPA policy manuals). *But see Consol. Edison Co. of N.Y. v. UGI Utils.*, Inc., 423 F.3d 90, 97 n.8 (2d Cir. 2005) (criticizing the use of "'potentially responsible person' and 'PRP'" because they "do not appear anywhere in the text of . . . CERCLA" and are "vague and imprecise," and relying instead on an "alternative designation—a party that, if sued, would be held liable . . .").

> transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . .

CERCLA § 107(a)(1)-(4). These covered persons "shall be liable for":

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe, not inconsistent with the [N]ational [C]ontingency [P]lan;[3]
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id. § 107(a)(4)(A)-(D).

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[3] The National Contingency Plan is "a set of regulations promulgated by the EPA that establishes procedures and standards for responding to releases of hazardous substances, pollutants and contaminants." *New Castle County*, 111 F.3d at 1120 n.2 (citing 42 U.S.C. § 9605 and 40 C.F.R. pt. 300).

B. Section 113

In 1986, Congress passed the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613. SARA amended CERCLA to add CERCLA § 113, 42 U.S.C. § 9613, which provides, in subsection (f)(1):

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [CERCLA § 107(a)] of this title, during or following any civil action under section 9606 [CERCLA § 106] of this title or under section 9607(a) [CERCLA § 107(a)] of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 [CERCLA § 106] of this title or section 9607 [CERCLA § 107] of this title.

CERCLA § 113(f)(1). The section also provides that: (1) a PRP that "has resolved its liability to the United States or a State in an administrative or judicially approved settlement" is immune from claims for contribution from other PRPs "regarding matters addressed in the settlement," *id.* § 113(f)(2); (2) a settling PRP can seek contribution from other non-settling PRPs, *id.* § 113(f)(3)(B); and (3) the statute of limitations for an action under § 107(a) is six years, while the statute of limitations for an action under § 113(f)(1) is only three years, *id.* § 113(g).

C. Section 120

CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1), also enacted as part of the 1986 SARA amendments, contains a broad waiver of the United States' sovereign immunity, providing that "[e]ach department, agency, and instrumentality of the United States" is subject to CERCLA's provisions "in the

same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 [CERCLA § 107] of this title." See *FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833, 840 (3d Cir. 1994) (en banc) ("[W]hen the government engages in activities that would make a private party liable [under CERCLA] if the private party engaged in those types of activities, then the government is also liable. This is true even if no private party could in fact engage in those specific activities." (emphases omitted)).

D. Evolution of Liability Under CERCLA and SARA

1. Pre-SARA Liability: Implied Contribution Rights

Prior to the enactment of the SARA amendments in 1986, several courts held that CERCLA exposed PRPs to joint and several liability, and that this implied a right of contribution among joint tortfeasors. See, e.g., *United States v. S.C. Recycling & Disposal, Inc.*, 653 F. Supp. 984, 994 (D.S.C. 1986), *vacated in part on other grounds sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807-08, 810 (S.D. Ohio 1983). Innocent parties were allowed to recover their full response costs from any PRP under § 107(a)(4)(B), *see Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 889, 891-92 (9th Cir. 1986); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985), and PRPs were allowed contribution pursuant to either an implied cause of action under § 107, *see City of Phila. v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982), or the common law, *see United States v. New Castle County*, 642 F. Supp. 1258, 1267-69 (D. Del. 1986) (hereafter "*NCC*"); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1489-90, 1491 (D. Colo. 1985). As the Supreme Court has explained, these cases allowed private parties, including PRPs, to seek contribution for costs incurred in forced or voluntary cleanups. *See, e.g., Cooper Indus.*, 543 U.S. at 161-62 (citing cases); *Reading*,

115 F.3d at 1118-19 (same, and noting that, "[u]ntil the passage of SARA in 1986, the judicially[] created expansion of § 107(a)(4)(B) served as the sole means by which parties could obtain contribution").

2. Post-SARA Liability: Cost Recovery and Contribution Actions

Following the passage of SARA and the inclusion of § 113 in CERCLA (which specifically provides contribution rights), courts retreated from implied causes of action for PRPs to seek contribution under § 107(a). Instead, they interpreted §§ 107 and 113 as establishing two "clearly distinct" remedies: "cost recovery" under § 107(a), and "contribution" under § 113(f). *See, e.g., Cooper Indus.*, 543 U.S. at 163 & n.3; *Morton Int'l*, 343 F.3d at 675 ("Accordingly, CERCLA and SARA together create two legal actions by which parties that have incurred costs associated with cleanups can recover some or all of those costs: (1) Section 107 cost recovery actions; and (2) Section 113 contribution actions.").

In *New Castle County*, we determined that a cost recovery action under § 107 is not available to a PRP.[4] Rather, "a section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken cleanups. *An action brought by a potentially responsible person is by necessity a section 113 action for contribution.*" *New Castle County*, 111 F.3d at 1120 (second emphasis added). We based our conclusion on the understanding that, although § 107 is not limited by its terms to innocent parties, the section "was designed to enable innocent persons who incur expenses cleaning up a site to recover their costs from potentially responsible persons," and thus "a potentially responsible person does not experience section 107 injury and

[4] The plaintiffs in *New Castle County* incurred response costs pursuant to an EPA consent decree that "requir[ed] them to finance and implement remedial action at the landfill." 111 F.3d at 1119.

cannot obtain section 107 relief." *Id.* at 1122.[5] Indeed, because § 107 imposes strict, joint, and several liability on all PRPs for the costs of cleanup, a PRP allowed to bring a cost recovery action under § 107 against another PRP "could recoup *all* of its expenditures regardless of fault"—which, we noted, "strains logic." *Id.* at 1120-21 (emphasis in original). Moreover, we concluded that it made little sense to allow a PRP the choice of proceeding under either § 107 or § 113, because parties would always choose § 107 (which allows recovery based on joint and several liability with a six-year statute of limitations) over § 113 (which allows recovery based on equitable apportionment of costs with a three-year statute of limitations), thus "render[ing] section 113 a nullity." *Id.* at 1123.[6]

In *Reading*, decided a few weeks after *New Castle County*, we held that a PRP also may not invoke the pre-SARA implied cause of action for contribution under § 107.[7]

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[5] Of course, § 107 also renders PRPs liable to federal and state governments and Indian tribes, and thus those parties (acting in their enforcement capacity, and not as PRPs) may bring § 107 cost recovery actions as well. *See* CERCLA § 107(a)(4)(A); *New Castle County*, 111 F.3d at 1123 (noting that "section 107 historically has been used by governments to recover costs incurred in the clean-up of hazardous sites").

[6] Numerous other Courts of Appeals considering this issue have reached the same result. *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-424 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349-356 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-06 (9th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 & n. 7 (11th Cir. 1996); *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 98-103 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

[7] The plaintiff in *Reading* incurred response costs pursuant to an EPA cleanup order under § 106 and a corresponding suit under § 107. 115 F.3d at 1116.

Examining the legislative history of § 113, we noted that the section was intended to "'clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.'" *Reading*, 115 F.3d at 1119 (quoting S. Rep. No. 99-11, at 44 (1985)) (alterations in original); *see also New Castle County*, 111 F.3d at 1122 (same, quoting H.R. Rep. No. 99-253(I), at 79 (1985)). Based on the statute's language, the legislative history, relevant case law, and "the fact that § 113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under . . . *section [107]*,'" *Reading*, 115 F.3d at 1120 (alterations in original),[8] we held that, "[i]n passing § 113(f), Congress acted to codify existing federal common law and to replace the judicially crafted measure with an express statutory remedy." *Id.* at 1119.

Thus we concluded that "Congress intended § 113 to be the *sole* means for seeking contribution." *Id.* at 1120 (emphasis added). It "replaced the judicially created right to contribution under § 107(a)(4)(B)" with an express (and exclusive) statutory remedy, *id.* at 1119, and also superseded common law remedies:

> [W]hen Congress expressly created a statutory right of contribution in CERCLA § 113(f), 42 U.S.C. § 9613(f), it made that remedy a part of an elaborate settlement scheme aimed at the efficient resolution of environmental disputes. Permitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Con-

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[8] As noted below, insofar as this quoted passage from *Reading* implies that § 113(f)(1) contribution is available without a preexisting suit, the Supreme Court ruled otherwise in *Cooper Industries*.

> gress. We conclude therefore that [the plaintiff's] common law claims are preempted by *CERCLA* § 113(f).

Id. at 1117.

In so holding, we acknowledged *dicta* in the Supreme Court's decision in *Key Tronic* that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs," 511 U.S. at 818, and that CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107," *id.* at 816. *See Reading*, 115 F.3d at 1120. We determined, however, that the "overlap" consisted of the fact that (as *New Castle County* held) an innocent private party (most likely a landowner who purchased land that had been contaminated by others) may bring a *cost recovery* action under § 107 holding a PRP jointly and severally liable for the full cost of the cleanup. *Reading*, 115 F.3d at 1120. "The fact, however, that a direct action might be brought under § 107(a) [by an innocent landowner against a PRP] does not open the door for [the] PRP to bring an action for contribution [against other PRPs] under that same section." *Id.*

In sum, after SARA introduced the § 113 contribution provision, our Court and other courts concluded that §§ 107 and 113 were complementary (but not really "overlapping," as the Supreme Court had suggested in *Key Tronic*) remedies. *Section 107* allowed the Government or an innocent landowner to recover the full cost of cleanup from a PRP on the basis of strict, joint, and several liability. The PRP could then seek contribution from other PRPs under § 113(f)(1). Moreover, according to the understanding at that time (as intimated in Reading), § 113(f)(1) allowed a PRP to seek contribution even in the absence of an action under § 106 or § 107; in other words, a PRP that voluntarily cleaned up a contaminated site *sua sponte* could seek contribution from other PRPs without waiting for an enforcement action, a Govern-

ment or innocent-landowner cost recovery suit, or a settlement of liability.

3. *Cooper Industries*

In *Cooper Industries*, the Supreme Court significantly altered this understanding. The Court held that the plain language of § 113(f)(1) (*i.e.*, "Any person may seek contribution from any other person who is liable or potentially liable under section [107] of this title, during or following any civil action under section [106] of this title or under section [107] of this title.") required a pre-existing civil action (either pending or completed) against the PRP under § 106 or § 107 *before* the PRP could seek contribution from other PRPs. The Court concluded that, "if § 113(f)(1) were read to authorize contribution actions at any time, regardless of the existence of a § 106 or § 107(a) civil action, then Congress need not have included the explicit 'during or following' condition" in § 113(f)(1). *Cooper Indus.*, 543 U.S. at 166. Thus, a PRP may only seek contribution under § 113(f)(1) if it is the subject of a § 106 or § 107 civil action or has been adjudged liable as a result of such an action. *Id.*[9]

The Court also considered the so-called "saving clause" of § 113(f)(1) ("Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] of this title or section [107] of this title."). We relied on this sentence in *Reading* when we said that § 113(f)(1) "specifically permits" a PRP to seek contribution from other PRPs without a pre-existing action under § 106 or § 107. 115 F.3d at 1120. Insofar as this statement implied that *§ 113(f)(1)* permitted such an action, the Supreme Court disagreed, noting that

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[9] The Court also noted that, under § 113(f)(3)(B), a PRP that has settled its liability to the federal or a state government also has a right to seek contribution. That right, the Court noted, is "a separate express right of contribution" independent of § 113(f)(1). *Cooper Indus.*, 543 U.S. at 163.

"[t]he sole function of the [saving clause] is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist *independently* of § 113(f)(1)." *Cooper Indus.*, 543 U.S. at 166 (emphasis added). As the Court explained,

> the sentence [*i.e.*, the saving clause] rebuts any presumption that the express right of contribution provided by the enabling clause [in § 113(f)(1)] is the exclusive cause of action for contribution available to a PRP. The sentence, however, does not itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought "during or following" a § 106 or § 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside § 113(f)(1). Reading the saving clause to authorize § 113(f)(1) contribution actions not just "during or following" a civil action, but also before such an action, would again violate the settled rule that we must, if possible, construe a statute to give every word some operative effect.

Id. at 166-67.

The Court left open the questions of whether a PRP may seek cost recovery under § 107, and whether that section includes an implied cause of action for contribution on which a PRP may rely independently of § 113. With respect to the former question, the Court noted that numerous decisions from the Courts of Appeals, including this Court's decision in *New Castle County*, had held that a § 107(a) cost recovery action is only available to an innocent party, and concluded that the question had not been briefed to the Supreme Court and thus it was "more prudent to withhold judgment on these matters." *Cooper Indus.*, 543 U.S. at 169-70. While the Court did not reach the latter issue as well, it drew the litigants' attention to those cases in which "this Court has visited the subject of implied rights of contribution before," *id.* at 170-71

(citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-47 (1981), and *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 90-99 (1981)). It noted further that, "in enacting § 113(f)(1), Congress explicitly recognized a particular set (claims 'during or following' the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law." *Id.* at 171.[10]

II. Facts and Procedural History

With this context, we turn to the facts of this case. Appellants E.I. DuPont de Nemours & Co., Conoco Phil-

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[10] In dissent, Justice Ginsburg relied heavily on the Court's *dicta* in *Key Tronic* that § 107 "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs," *see Key Tronic*, 511 U.S. at 818, a proposition she believed applied to PRPs. *Cooper Indus.*, 543 U.S. at 172 (Ginsburg, J., dissenting). She argued that "all Members of this Court agreed" that § 107 provided such a cause of action. *Id.* Indeed, Justice Scalia's dissent in *Key Tronic* focused merely on whether the cause of action was express (as he believed it was) or implied (as the majority stated). See *Key Tronic*, 511 U.S. at 822 (Scalia, J., dissenting in part). Justice Ginsburg thus concluded that "no Justice [in *Key Tronic*] expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred," and thus would have recognized a cause of action for PRPs to seek contribution under § 107. *Cooper Indus.*, 543 U.S. at 172, 174 (Ginsburg, J., dissenting).

Justice Ginsburg's conclusion presumes, however, that the "private parties" the Court agreed in *Key Tronic* had a cause of action under § 107 included PRPs seeking contribution from other PRPs, and not merely (as we held in *Reading* and *New Castle County*) innocent private parties seeking cost recovery from PRPs on a joint and several basis. The *Cooper Industries* majority appears to agree with our view, retreating significantly from its earlier *dicta* and noting that, although the *Key Tronic* majority spoke of "'similar and overlapping' remedies[,] . . . [t]he cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties[, b]ut the two remedies are clearly distinct." *Cooper Indus.*, 543 U.S. at 163 n.3.

lips Co., and Sporting Goods Properties, Inc. (collectively "DuPont" or "appellants")[11] appeal from a March 1, 2004 order of the United States District Court for the District of New Jersey granting the United States judgment on the pleadings and denying DuPont's motion for judgment under Federal Rule of Civil Procedure 54(b) and its request for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This order rested on an earlier opinion and order, entered on December 30, 2003, granting the Government summary judgment in a "test case" brought to determine whether DuPont had a cause of action against the Government for contribution under CERCLA.[12] DuPont asserts the District Court erred in its statutory analysis, that an implied cause of action exists under federal common law, and that the District Court mistakenly dismissed all claims (and not just the test case) on the pleadings.

A. Background

This case concerns fifteen facilities owned by appellants in several states, including New Jersey.[13] Each of the sites is contaminated with hazardous waste, and was owned or operated by the United States at various times during World War I, World War II, and/or the Korean War, during which

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[11] Because DuPont was the only plaintiff at issue in the "test case" litigated before the District Court, we refer to the parties in most instances as "DuPont." Insofar as the identity of parties other than DuPont is relevant, we refer to the parties as "appellants."

[12] The District Court's December 30, 2003 order was superseded by an amended order on January 8, 2004. For purposes of this appeal, the orders are substantively identical.

[13] The facilities include DuPont sites in Pompton Lakes, New Jersey; Newark, New Jersey; Parlin, New Jersey; Carneys Point, New Jersey; Gibbstown, New Jersey; Buffalo, New York; Niagara, New York; Niagara Falls, New York; East Chicago, Indiana; Louisville, Kentucky; Nashville, Tennessee; Spruance, Virginia; and Belle, West Virginia; a ConocoPhillips site in Ponca City, Oklahoma; and a Sporting Goods Properties site in Bridgeport, Connecticut.

time the United States was responsible for some contamination.

Appellants brought an action against the United States in January 1997 (before the Supreme Court's decision in *Cooper Industries*) seeking contribution from the Government toward the costs of cleanup at the sites. Initially, the complaint alleged causes of action under CERCLA § 107(a) (cost recovery) and § 113(f)(1) (contribution).[14] We decided *New Castle County* and *Reading* in May and June 1997, respectively; in keeping with those holdings, appellants' § 107(a) claim was voluntarily dismissed without prejudice. *See E.I. DuPont de Nemours & Co. v. United States*, 297 F. Supp. 2d 740, 742-43 (D.N.J. 2003). The District Court thereafter designated one of the facilities named in the complaint—the DuPont facility in Louisville, Kentucky—as a "test case" to determine whether DuPont (which had voluntarily undertaken to clean up the site without a preexisting § 106 or § 107 action or a § 113(f)(3) settlement) could seek contribution from other PRPs under § 113(f)(1). Full discovery was had regarding the claims related to the Louisville facility, and the Government moved for summary judgment under Federal Rule of Civil Procedure 56 on the ground that, as a PRP that had voluntarily incurred its cleanup costs without having been sued or settled its liability, DuPont had no cause of action for contribution under § 113.

B. First District Court Decision

On December 30, 2003, the District Court issued a lengthy opinion and order granting the Government's motion for summary judgment with respect to the Louisville facility. *See E.I. DuPont*, 297 F. Supp. 2d 740. The Court concluded that a

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[14] The complaint also included a separate count seeking "recoupment" of costs, but did not provide any statutory basis for this claim. This count was voluntarily dismissed in December 1997. *See E.I. DuPont de Nemours & Co. v. United States*, 297 F. Supp. 2d 740, 743 (D.N.J. 2003).

PRP, like DuPont, could only bring a contribution action in three circumstances: (1) during or following a civil action against the PRP under § 106 or § 107 (as set forth in § 113(f)(1)); (2) after the PRP entered into a judicially or administratively approved settlement of its liability (as set forth in § 113(f)(3)(B)); or (3) as suggested by the "saving clause," in some other undefined contribution action. *Id.* at 747. Since DuPont had not been sued under § 106 or § 107, and had not settled its liability with respect to the Louisville facility, the Court considered whether it could pursue some other contribution action.

It noted that the saving clause should not be read to allow a contribution action, regardless of its source (such as "some other (federal or state) statute," *id.* at 750), unless the plaintiff satisfied the "requirements of a traditional, common law contribution action." *Id.* at 751; *see also Reading*, 115 F.3d at 1124 (noting that the term "contribution" in CERCLA is used "in its traditional, commonlaw sense"). Such an action "'exists only in favor of a tortfeasor who has *discharged* the *entire* claim for the harm by paying more than his equitable share of the common liability.'" *E.I. DuPont*, 297 F. Supp. 2d at 746 (quoting Restatement (Second) of Torts § 886A(2)) (emphases in original). Moreover, the District Court concluded that "a contribution action requires (at least) a prior or ongoing *lawsuit*," *id.* at 749 (emphasis in original), and DuPont's claim regarding the Louisville facility did not meet these criteria.

The Court concluded that "the purpose of the so-called saving clause [in § 113(f)(1)] was to clarify that a contribution action brought following a settlement under the aegis of Section 113(f)(3) should not be held to be procedurally insufficient because of an absence of a prior primary action brought pursuant to CERCLA Sections 106 or 107." *Id.* at

754 (emphasis omitted).[15] It granted the Government's motion for summary judgment on this basis.[16]

C. Second District Court Decision

On March 1, 2004, the District Court issued another opinion and order granting the Government judgment on the pleadings under Federal Rule of Civil Procedure 12(c) with respect to the other fourteen sites mentioned in appellants' complaint, and denying appellants' request for judgment under Federal Rule of Civil Procedure 54(b) or certification of an interlocutory appeal from the Court's prior order. The Court noted that, although appellants' lawyers represented they "'could amend the Complaint to potentially comply'" with the Court's earlier opinion—by, for example, showing that they incurred cleanup costs at some of the sites pursuant to EPA orders or consent decrees—"[a] party's lawyer's representation is not evidence[, and] this representation [does not] appear in the pleadings." *E.I. DuPont de Nemours & Co.*

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[15] The Court noted the possibility that the saving clause was intended to preserve causes of action for contribution arising from non- § 113 CERCLA provisions without a prior settlement or suit, but concluded that, under this Court's decision in *Reading* that § 113 displaced all pre-SARA common law or implied rights of action for contribution under sections other than § 113, such an interpretation was not persuasive. *E.I. DuPont*, 297 F. Supp. 2d at 750.

[16] The Court admitted that its holding would "limit the ability of some PRPs to recoup cleanup costs from other PRPs," and that this "might very well hamper some PRP efforts at removal and remediation of hazard[ous] waste sites." *E.I. DuPont*, 297 F. Supp. 2d at 754. Indeed, the Court noted that if "the statute were ambiguous or if the Court believed that the meaning of the term 'contribution' were unsettled when Congress wrote the SARA amendments, then [it] would of necessity turn to the general purposes of the statute to determine the reach of the provision." *Id.* at 754-55. But the Court concluded that "the statute's terms appear reasonably clear," and thus any effort to allow contribution in the absence of a prior suit or settlement "would be rewriting the statute, [which] is not the Court's role." *Id.* at 755.

v. United States, No. 97-497, slip op. at 5 n.4 (D.N.J. March 1, 2004). Indeed, the Court noted,

> [the] Complaint and the competent evidence before this Court do not establish or tend to establish that the fourteen remaining sites (unaffected by this Court's prior amended order) are in any material sense distinguishable from the Louisville site. Prior to and during briefing of the Government's current motion, Plaintiffs failed to produce *any* (record) evidence, in the form of affidavits, certifications, copies of agreements settling CERCLA claims, or records of prior judicial or administrative CERCLA § 106 orders or CERCLA § 107 proceedings. Even at oral argument, Plaintiffs did not seek leave to amend their Complaint or permission to make a late filing. Simply put, at this juncture, there is nothing in the record before this Court establishing or tending to establish with regard to any of the remaining sites that any Plaintiff (in the instant action) either has settled a CERCLA § 113(f)(3) claim or has been named a defendant in a (prior or on-going) CERCLA § 106 or CERCLA § 107 action.

Id. at 4-5 (emphasis in original) (footnote omitted).

The District Court thus concluded that the pleadings did not suggest any basis on which it could reach a conclusion with respect to the fourteen other sites different from its conclusion with respect to the Louisville site, and therefore granted the Government judgment on the pleadings for all sites.

D. Appeal

DuPont and the other plaintiffs appealed, and we stayed briefing pending the Supreme Court's decision in *Cooper Industries*. As noted, the Supreme Court's decision confirmed the District Court's conclusion that contribution under § 113

is available to a PRP only if it settles its liability or is subject to a civil action under § 106 or § 107.

In light of *Cooper Industries*, DuPont raises four issues on appeal and makes the following arguments. First, it contends that § 107 expressly provides PRPs a cause of action to seek contribution from other PRPs independent of the remedy provided by § 113. Second, it asserts alternatively that such a cause of action is implied in § 107 or arises from federal common law. Third, it argues that the District Court erred in applying a multi-part test for contribution claims that is inconsistent with our Court's precedent. Fourth, it contends the District Court erred in granting the Government judgment on the pleadings with respect to the non-Louisville sites. For the reasons stated below, the District Court's December 30, 2003 order (as amended on January 8, 2004) is affirmed, and its March 1, 2004 order is also affirmed, with one exception that will be explained below.

III. Jurisdiction and Standard of Review

The District Court had subject matter jurisdiction over this case under 28 U.S.C. § 1331, and we have jurisdiction on appeal under 28 U.S.C. § 1291. We exercise plenary review of a district court's grant of summary judgment and judgment on the pleadings. *See Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 219-20 (3d Cir. 2005). In conducting this review, all facts and inferences are construed in the light most favorable to the non-moving party, and "[j]udgment will not be granted unless the movant clearly establishes there are no material issues of fact, and he is entitled to judgment as a matter of law." *Id.* at 220. Our review of questions of statutory interpretation is also plenary. *United States v. E.I. DuPont de Nemours & Co., Inc.*, 432 F.3d 161, 164 (3d Cir. 2005) (en banc).

IV. Availability of Contribution

Although DuPont would undoubtedly prefer that we write our decision on a blank slate in deciding whether it may seek contribution under § 107(a), we cannot do so. Rather, we must decide if our prior decisions in *New Castle County* and *Reading* control this case or are distinguishable. If they control, we must then decide whether our panel may decline to follow those precedents "in light of intervening authority even without en banc consideration." *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 161 (3d Cir. 2004). As we explain below, we hold that *New Castle County* and *Reading* control the outcome of this case, and no intervening authority provides a basis sufficient to reconsider those precedents.[17]

A. Applicability of *New Castle County* and *Reading*

To repeat, *New Castle County* and *Reading* stand jointly for the proposition that a PRP seeking to offset its cleanup costs must invoke contribution under § 113; the express cause of action under § 107 (cost recovery) is limited to gov-

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[17] The Government contends that, because none of the appellants pursued express or implied causes of action for contribution under § 107(a) or federal common law in the District Court, these claims are waived on appeal. Appellants did, however, seek the relief they believed available to them under this Court's precedents. Since *Cooper Industries* had not been decided at the time final judgment was rendered by the District Court, there was no reason appellants should have thought it potentially useful to pursue a remedy under § 107(a)—that remedy was foreclosed by *Reading*, and the view at the time was that they had a cause of action under § 113. Regardless of whether their arguments regarding a cause of action under § 107(a) are ultimately persuasive, it is clear to us that *Cooper Industries* raised legal questions DuPont had no reason to ask before that decision. We will therefore exercise our discretion to consider DuPont's arguments on the merits. *See Salvation Army v. Dep't of Cmty. Affairs of N.J.*, 919 F.2d 183, 196 (3d Cir. 1990) ("Where, as here, a previously ignored legal theory takes on new importance due to an intervening development in the law, it is appropriate for us to exercise our discretion to allow a party to revive that theory.").

ernments and Indian tribes (acting in their enforcement capacity) and innocent landowners, and no implied cause of action for contribution for PRPs—under either § 107 or the common law—survived the passage of § 113. This rule, unless factually distinguishable, controls the case before us.

Recently, the United States Court of Appeals for the Second Circuit decided *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005), which held that, despite a prior Second Circuit decision suggesting the contrary, a PRP has an implied cause of action for contribution under § 107. *See id.* at 100 & n.11 (concluding that "section 107(a) permits a [PRP] that has not been sued or made to participate in an administrative proceeding . . . to recover necessary response costs incurred voluntarily," which the Court deemed "consistent with the view that courts took of section 107(a) before section 113(f)(1) was enacted"). The Second Circuit admitted that its earlier holding in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998)—which is substantively similar to our holdings in *New Castle County* and *Reading*—was inconsistent with this approach. Nonetheless, the panel "decline[d] to answer the question whether a three-judge panel of this court may depart from *Bedford Affiliates's* . . . holding." *Consol. Edison*, 423 F.3d at 101 n.12. It noted that, as in *New Castle County* and *Reading* (but unlike in *Consolidated Edison* or this case), the plaintiff in *Bedford Affiliates* cleaned up its site pursuant to a consent order and sought relief under both § 107 and § 113.

Thus, the Court limited *Bedford Affiliates* "to hold that a party that has incurred or is incurring expenditures under a consent order with a government agency and has been found partially liable [for contribution] under § 113(f)(1) may not seek to recoup those expenditures under section 107(a)." *Id.* at 102. The Court concluded that its holding in Consolidated Edison—"that a party that has *not* been sued or made to participate in an administrative proceeding, but, *if* sued, would

. . . be liable under section 107(a), may still recover necessary response costs incurred voluntarily"—did not conflict with its understanding of *Bedford Affiliates*. *Id.* (emphases added).[18]

DuPont would have us adopt this reasoning to distinguish *New Castle County* and *Reading*. It argues that, as in *Bedford Affiliates*, both of our prior cases involved PRPs that cleaned up sites pursuant to some form of EPA oversight.[19] Tracking the analysis in *Consolidated Edison*, DuPont asserts that *New Castle County* and *Reading* are fundamentally different from this case (where appellants cleaned up their sites voluntarily), because the rule in our prior cases may be limited factually to those circumstances where a PRP has already satisfied the prerequisites for § 113 contribution set forth in *Cooper Industries*.

We disagree. Although we will not dispute the Second Circuit's interpretation of its precedent, we do not read our

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[18] Shortly before we filed this opinion, the United States Court of Appeals for the Eighth Circuit decided *Atlantic Research Corp. v. United States*, ___ F.3d ___, 2006 WL 2321185 (8th Cir. Aug. 11, 2006), in which it reached the same result as the Second Circuit in *Consolidated Edison*. We note that *Atlantic Research* relies almost entirely on the reasoning of *Consolidated Edison*, and thus our consideration of the Second Circuit's case applies as well to the decision of the Eighth Circuit.

One important difference between the two cases is that in *Atlantic Research* (as here) the United States was a party. The Eighth Circuit based its decision, in part, on its conclusion that denying a PRP that voluntarily cleans up a site contribution from the Government would allow the Government to "insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." *Atlantic Research*, 2006 WL 2321185, at *8. As we explain in footnote 31 below, however, we are underwhelmed by this argument.

[19] As noted, the *New Castle County* plaintiffs incurred response costs pursuant to an EPA consent decree, *see* 111 F.3d at 1119, and the *Reading* plaintiff cleaned up its site pursuant to a § 106 order and § 107 suit, *see* 115 F.3d at 1116.

precedents to be so limited. Nothing in *New Castle County* and *Reading* suggests that our holdings in those cases depended on the motivations for the cleanups. Indeed, we reached the § 107 and common law claims in those cases precisely because § 113 was not sufficient to dispose of the appeals. In *New Castle County*, for example, we noted that the circumstances of that case forced us to decide whether a PRP may seek cost recovery under § 107 (even if it would ordinarily qualify for contribution under § 113) because the respective statutes of limitations for the different types of claims meant that, on the facts of the case, a § 107 cost recovery action would have been timely but a § 113 contribution action would not. 111 F.3d at 1120. And in *Reading*, we necessarily considered whether *any* contribution claim (common law, implied in § 107, or express in § 113) could survive the discharge of a PRP's liability to the United States in a bankruptcy proceeding. We concluded that an express § 113 contribution claim was precluded by the fact that the Government's claim against the PRP was discharged by the PRP's bankruptcy, meaning there was no underlying action and thus other PRPs could not seek contribution from the debtor. *Reading*, 115 F.3d at 1126. We rejected the common law and implied cause of action claims because they were categorically precluded by the statute. *Id.* at 1117, 1120-21.

It is familiar law that when the rule in a prior case by its terms controls the outcome of a current case, we will not reach out to distinguish the prior case on the basis of factual differences that were not "material" to the earlier holding. As Judge Kozinski explained in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), common law precepts require that "a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there maybe factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distin-

guished on a principled basis." *Id.* at 1172; *see also United States v. Rosero*, 42 F.3d 166, 174 n.16 (3d Cir. 1994) (refusing the defendants' invitation to distinguish an earlier case because the precedent was not "materially distinguishable" from the facts at hand); *Black's Law Dictionary* 629 (8th ed. 2004) (defining a "material fact" as one "that is significant or essential to the issue or matter at hand"). Our holdings in *New Castle County* and *Reading*—based on our interpretation of the statute—are broad, and nothing in those cases suggests that the results would have been different if the plaintiffs had undertaken voluntary cleanups.[20] We do not,

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[20] At least one commentator has suggested that courts "do not concede to their predecessors the power of laying down very widerules; they reserve to themselves the power to narrow such rules by introducing into them particular facts of the precedent case that were treated by the earlier courts as irrelevant." John Salmond, *Jurisprudence* 192 (10th ed. 1947), *reprinted in Black's Law Dictionary* 507 (8th ed. 2004). While this may be true as a general proposition, it cannot serve as a rule of decision in a case such as this. First, even if a panel treated certain facts as "irrelevant" in a prior opinion, they must still be material to the earlier holding to serve as a basis for distinguishing the case, as our discussion above demonstrates. Second, and perhaps more importantly, our interpretation of CERCLA's requirements in *New Castle County* and *Reading* established that the plaintiffs in those cases lost *not* because they had been compelled to clean up their sites and hence qualified for contribution under § 113 (indeed, as explained, neither plaintiff could in fact seek § 113 contribution on the facts of those cases), but because their complaints alleged causes of action under § 107 or the common law that were not authorized by the statute for *any* PRP. Of course, our Court might still have ruled against the plaintiffs by interpreting CERCLA differently, but that is not the interpretation we deemed appropriate based on the terms of the statute.

Particularly in the statutory interpretation realm, where courts must faithfully apply Congress' words and determine their settled meaning, the breadth of a court's holding is often compelled by the scope of Congress' prescription. We therefore reject the argument that our holdings in *New Castle County* and *Reading* (that CERCLA precludes PRPs from seeking cost recovery or contribution under § 107, and establishes § 113 as the sole basis on which a PRP may equitably apportion its costs through contribution) are broader than they needed to be on the facts of those

therefore, believe our precedents may be distinguished from this case as the Second Circuit distinguished *Bedford Affiliates* from the circumstances of *Consolidated Edison*.

B. Continued Viability of *New Castle County* and *Reading* After *Cooper Industries*

We turn, then, to the question of whether we may nonetheless reconsider our precedents in light of intervening authority. In doing so, we are mindful of the Supreme Court's admonition that when "dealing with an issue of statutory interpretation, . . . the claim to adhere to case law is generally powerful once a decision has settled statutory meaning." *Shepard v. United States*, 544 U.S. 13, 23 (2005); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("[T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

Because the statute itself has not changed, DuPont focuses its attention on *Cooper Industries*. Its arguments may be distilled to two intersecting theories. First, it argues that *Cooper Industries* undercut a supposed major premise of our holding in *Reading*—namely, that a PRP could seek contribution from another PRP without having been sued or settled its liability. Thus, DuPont contends that the analytical foundation of *Reading* was overruled by the Supreme Court and we may, therefore, disregard our prior decision. Second, it contends that *Cooper Industries* changed settled expecta-

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cases. To the contrary, those rules apply directly to this case, and may not be distinguished based on facts that were not material to the earlier decision, especially since the terms of the statute have not changed.

tions in the cost apportionment field to such a dramatic extent that the rules set out in *New Castle County* and *Reading* no longer serve the purposes of CERCLA. As such, DuPont argues, the intervening authority of *Cooper Industries*, when viewed in the light of CERCLA's legislative history, provides a basis for us to find an express or implied cause of action for contribution under § 107 or the common law notwithstanding our precedent.

1. Alleged Inconsistency Between *Cooper Industries* and *Reading*

   a. Facial Inconsistency

Cooper Industries did not explicitly or implicitly overrule our precedents; indeed, the Supreme Court expressly declined to consider the very questions at issue here. *See Cooper Indus.*, 543 U.S. at 168-71. Though it is true that our observation in *Reading* that "§ 113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under . . . section [107],'" 115 F.3d at 1120, cannot support a cause of action for PRPs engaged in voluntary cleanups after *Cooper Industries*, we reject DuPont's view that this fatally undermines *Reading's* holding. For one thing (as explained in Part IV.B.1.b below), our statement in *Reading* did not necessarily endorse a *§ 113(f)(1)* contribution action in the absence of a preexisting civil action (and is not, therefore, clearly at odds with the Supreme Court's later instructions). But insofar as our statement can be read to recognize implicitly that possibility, it merely "*reenforce[d]* our conclusion that Congress intended § 113 to be the sole means for seeking contribution." *Id.* (emphasis added). We also relied on our precedent in *New Castle County*, the holdings of other Courts of Appeals, rules of statutory construction, and CERCLA's purpose following the SARA amendments, in deciding that § 113 provides the only contribution remedy under CERCLA. We conclude that, even disregarding the possible implicit reference in *Reading* to a § 113(f)(1)

contribution action in the absence of a § 107 suit, our holding in that case was amply supported on other grounds and therefore survives *Cooper Industries*.

b. Saving Clause

It is true that *Reading's* statement—which quotes from § 113(f)(1)'s saving clause—*could* be read to endorse a contribution action under § 113(f)(1) without a preexisting civil action, and as such would be wrong. *See Cooper Indus.*, 543 U.S. at 167 (explaining that the saving clause "does [not] . . . expand § 113(f)(1) to authorize contribution actions not brought 'during or following' a § 106 or § 107(a) civil action"). But the Supreme Court also observed that while the saving clause "rebuts any presumption that the express right of contribution provided by the enabling clause [in § 113(f)(1)] is the exclusive cause of action available to a PRP," it does not "specify what causes of action for contribution, if any, exist outside § 113(f)(1)," and the Court did not itself address the question further. *Id.* at 166-67.

We do know, however, there is one express cause of action available to a PRP for contribution under CERCLA outside the strictures of § 113(f)(1): contribution under § 113(f)(3)(B) for PRPs that settle their liability "in an administrative or judicially approved settlement." Our statement in *Reading* is not, therefore, necessarily incorrect: it is true that § 113(f)(1) does *not* foreclose contribution actions when the PRP has not been sued, because § 113(f)(3)(B) remains available if the party chooses to settle. As we explain below, SARA's legislative history makes clear that the § 113(f)(3)(B) settlement provision is one of two incentives that are crucial to a carefully considered scheme to encourage PRPs to settle their liability, enter into consent decrees, and perform supervised cleanups.[21] The District Court concluded that the § 113(f)(1)

[21] The other incentive is the contribution protection for settling PRPs provided under § 113(f)(2).

saving clause merely clarifies that "a contribution action brought following a settlement under the aegis of Section 113(f)(3) should not be held to be procedurally insufficient because of an absence of a prior primary action pursuant to CERCLA Sections 106 or 107." *E.I. DuPont*, 297 F. Supp. 2d at 754 (emphasis omitted). As the discussion below demonstrates, this interpretation is consistent with the settlement provisions in SARA, and though there is no legislative history regarding the meaning of the saving clause, we are confident that the District Court's interpretation is in accord with CERCLA's purpose (as amended by SARA), as is our decision in *Reading*. We therefore decline DuPont's invitation to revisit *Reading* solely because its possible interpretation of the saving clause is incorrect, especially since our statement in *Reading* is not necessarily inconsistent with *Cooper Industries* in the first place.

2. Statutory Purpose

DuPont's argument regarding the purpose of CERCLA merits more discussion. To repeat, DuPont contends that, in the wake of *Cooper Industries*, our decisions in *New Castle County* and *Reading* are in direct opposition to CERCLA's broad remedial purpose as expressed in its legislative history. This, it urges, makes necessary an implied cause of action for contribution, available to PRPs that voluntarily clean up contaminated sites, to fill the gaps *Cooper Industries* recognized in Congress' remedial scheme. Indeed, as one Court has noted, the "combined result" of *Cooper Industries* and cases like *New Castle County* and *Reading* is "quixotic": "the present statutory arrangement resulting from the combined authority of [*Cooper Industries* and earlier Courts of Appeals cases] compels a responsible party engaged in voluntary remediation to foot the bill for other parties, which will have the effect of encouraging responsible parties to rest on their heels and wait for the instigation of adverse proceedings, rather than implement a cost-effective environmental con-

tamination response strategy." *Mercury Mall Assocs., Inc. v. Nick's Market, Inc.*, 368 F. Supp. 2d 513, 519 (E.D. Va. 2005) (internal quotation marks and alterations omitted).

As *amici* American Chemistry Council and Superfund Settlements Project assert, allowing only sued or settling PRPs to seek contribution "would discourage and delay the very cleanups that Congress sought to encourage and accelerate" by enacting CERCLA. *Amici* Br. at 9. Indeed, *amici* assert that the EPA has long encouraged PRPs to clean up contaminated sites voluntarily, and for those who do (*amici* estimate around 70% of all cleanups), the EPA has stated that it is "'important to . . . remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.'" *Id.* at 7-8 (quoting National Oil and Hazardous Substance Contingency Plan, 55 Fed. Reg. 8666, 8792-93 (March 8, 1990)).[22] If PRPs engaged in voluntary cleanups may not seek contribution, DuPont and *amici* argue, "companies would resist undertaking new cleanup obligations, and would rarely do so voluntarily," thus frustrating core purposes of CERCLA. *Id.* at 9.

a. CERCLA's Legislative History

We begin, then, with the legislative history of CERCLA.[23]

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[22] As we explain in footnote 30 below, however, this statement is taken out of context. In context, it is clear the EPA refers to cost recovery actions—which, as we noted in *New Castle County*, are available only to innocent parties, not PRPs.

[23] We are mindful, of course, that legislative history can sometimes be "murky, ambiguous, and contradictory," and that recourse to it as an interpretive aid may, if we are not careful, devolve to "an exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. ___, 125 S. Ct. 2611, 2626 (2005) (internal quotation marks omitted). We are confident that these concerns are not implicated here. Though (as explained below) the legislative history of CERCLA is rather unclear, particularly with respect to voluntary cleanups by PRPs, the legislative history of SARA uniformly indicates the intent of Congress to encourage settlement by, *inter alia*, authorizing an express

Although the statute is supposed to be "comprehensive," the legislative history is not, as many of the pre-SARA cases that allowed an implied right of action under § 107 observed. *See, e.g., Walls*, 761 F.2d at 318 ("[T]he legislative history of CERCLA is vague, reflecting the compromise nature of the legislation eventually enacted."); *NCC*, 642 F. Supp. at 1263 (noting "the absence of significant legislative history" of CERCLA); *see also* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envtl. L. 1, 2 (1982) ("In the instance of the 'Superfund' legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law.").

Though without doubt CERCLA's drafters intended that the statute encourage responsible parties to clean up hazardous waste sites and bear the costs of doing so, *see Morton Int'l*, 343 F.3d at 676, Congress' position on voluntary cleanups is less clear. Reporting on the proposed Hazardous Waste Containment Act (the House of Representatives' version of CERCLA, *see* Grad, *supra*, at 4-5),[24] the House Committee on Interstate and Foreign Commerce noted that the bill would "establish a Federal cause of action in strict liability to enable the [EPA] administrator to pursue rapid recovery of the costs incurred for the costs of such [cleanup] actions undertaken by him from persons liable therefor and to induce

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and limited contribution right. We also observe that, although we would of course have no need to look to the legislative history to discern the meaning of an unambiguous statutory provision, *see Cooper Indus.*, 543 U.S. at 167, we need to consult the legislative history where, as here, a party urges us to disregard precedent and *imply* a cause of action to effect the intent of Congress.

[24] For a thorough review of the legislative debates on the House and Senate versions of CERCLA, and the compromises that allowed the legislation to become law, *see* Grad, *supra*.

such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." H.R. Rep. No. 96-1016(I), at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. Representative Florio, the floor manager of the legislation in the House, noted that "[t]he strong liability provisions that are in our bill . . . are very important, because we want to induce those who know where these sites are to remedy the sites themselves. If there is no liability provision, they will not have any incentive whatsoever to go forward on a voluntary basis and clean up those sites." 126 Cong. Rec. H9441 (daily ed. Sept. 23, 1980); *see also id.* at H9467 (statement of Rep. Florio) ("EPA is required not to act if the responsible party or parties will take appropriate action to clean[]up and contain these sites.").

These statements do not, however, establish that Congress necessarily intended that PRPs engaged in voluntary cleanups be able to seek contribution; they could just as easily reflect congressional recognition that a strong enforcement scheme holding wrongdoers liable would encourage PRPs to head off potentially ruinous litigation or punitive settlements and clean up their own mess.[25] Indeed, Congress provided no express right of contribution for any PRP that incurred response costs, whether voluntarily or not. Language providing an express cause of action for contribution among PRPs was rejected by Congress, *see NCC*, 642 F. Supp. at 1263, as was language providing for joint and several liability, *see, e.g.*, 126 Cong. Rec. S14,964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph) ("It is intended that issues of liability not resolved

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[25] Indeed, the companion legislation in the Senate focused more on deterrence than on encouraging voluntary cleanups. *See* S. Rep. No. 96-848, at 13, 15 (1980) (noting that the bill's intent was that "those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions" on the basis of "strict, joint, and several liability" to create an "incentive for greater care focus[ed] on the initial generators of hazardous wastes").

by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tort feasors will be determined under common or previous statutory law."); 126 Cong. Rec. H11, 787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio) (same).

While it is clear that CERCLA's drafters intended common law principles to govern liability, we have not found evidence in the legislative history that Congress contemplated this would extend a contribution right to PRPs engaged in entirely voluntary cleanups. In fact, the House and Senate floor managers' statements that liability would be governed by common law principles appear inconsistent with this possibility, since contribution among jointly and severally liable tortfeasors ordinarily follows a determination of liability to a common plaintiff who suffered an injury. *See, e.g., Restatement (Second) of Torts §§ 875, 886A* (1979); 2 Michael Dore, *Law of Toxic Torts* § 16.04 (1999) ("In general, contribution is available whenever a party is held liable to a plaintiff for injuries [for] which other parties were at least partially responsible."); *see also Northwest Airlines*, 451 U.S. at 86-88 (noting that, in "most American jurisdictions, . . . a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability"). As then-Representative Gore explained to the House of Representatives in offering an amendment to the Hazardous Waste Containment Act,

> Joint and several liability ordinarily would mean that whenever a single, indivisible harm is sustained as a result of independent, separate, but concurring tortious acts by two or more actors, each can be held liable for the entire amount of damages incurred. . . . The plaintiff could collect the total sum of damages awarded from a

> single defendant and could avoid the agony of multiple suits against the defendants that would otherwise be necessary to achieve full compensation.
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> Under the theory of contribution, the defendant from whom the plaintiff receives payment may then collect from the other defendants for that part of the damages for which each is responsible. . . . [C]ourts [have] concluded that because the defendants were the ones at fault, it would be unfair to place the burden of demonstrating the apportionability of the damage on the plaintiff. The burden was thus placed on the defendants to work out for themselves who was responsible for what part of the injury under the process of contribution [after the plaintiff recovered his damages].

126 Cong. Rec. H9463 (daily ed. Sept. 23, 1980).

b. SARA's Legislative History

The legislative history of the SARA amendments, while labyrinthine, is less clouded than the legislative history of CERCLA as initially enacted, particularly with respect to contribution and voluntary cleanups. *Cooper Industries* puts beyond question that § 113 establishes a contribution remedy only for PRPs that have settled their liability or have been sued, and the legislative history supports this reading. *See, e.g.*, S. Rep. No. 99-11, at 44 (1985) (stating that § 113 "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties"); H.R. Rep. No. 99-253(I), at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (same); H.R. Rep. No. 99-253(III), at 18 (1986), reprinted in 1986 U.S.C.C.A.N. 3038, 3041 (stating that § 113 "clarifies and emphasizes that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties").

SARA's legislative history also reveals an express bent toward encouraging settlement. *See, e.g.*, H.R. Rep. No. 99-253(III), at 29, *reprinted in* 1986 U.S.C.C.A.N., at 3052 ("The Judiciary Committee strongly agrees with the Energy and Commerce Committee that encouraging . . . negotiated clean-ups will accelerate the rate of clean-ups and reduce their expense by making maximum use of private sector resources. The Committee also agrees that this emphasis on negotiated clean-ups should not replace or diminish a strong and aggressive enforcement policy, but rather should complement such a policy."); H.R. Rep. No. 99-253(I), at 100-01, *reprinted in* 1986 U.S.C.C.A.N., at 2882-83 (same). As the Senate Environment and Public Works Committee reported, voluntary cleanups, though desirable, should be undertaken pursuant to a settlement with the EPA:

> Congress, the EPA, responsible parties, and other critics have suggested several means of speeding up and economizing on site cleanups. These include enlarging the Superfund, setting program deadlines, expanding the EPA program offices, empowering citizens to sue, and encouraging voluntary cleanup by industry. Although enlarging the Fund, providing more staff, and setting program deadlines would tend to accelerate the CERCLA effort, the Administrative Conference believes that a properly designed site cleanup negotiation process, through which responsible parties or third parties would agree to act directly to clean up sites, would also hasten cleanup while reducing its expense by tapping the technical and financial resources of the private sector. Involvement of the federal government and affected citizens in this process would ensure adequate protection of public health and the environment.
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> . . .

> The final agreement should take the form of an administrative consent order under section 106 of CERCLA or a judicial consent decree.

S. Rep. No. 99-11, at 65, 67; *see also* H.R. Rep. No. 99-253(V), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3181 ("The Committee recognizes that Fund-financed cleanups, administrative action and litigation—even under a strong and vigorous enforcement program—will not be sufficient to accomplish CERCLA's goals. *Voluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution problem. SARA's settlement provisions are] intended to encourage and establish procedures and protections pertaining to negotiated private party cleanup of hazardous substances where such cleanup is in the public interest."* (emphasis added)); 132 Cong. Rec. H9609 (statement of Rep. Slattery) ("This legislation . . . encourages potentially responsible parties to come out of the woodwork and the courts, and settle on an environmentally acceptable cleanup plan.").

It is also apparent from the legislative history that Congress intended the contribution allowed by § 113 to be a crucial part of its scheme to encourage settlement and (by extension) private cleanups by PRPs within the bounds of the settlement agreements. The House Energy and Commerce Committee, for example, reported that limiting contribution to parties who were sued or settled

> should encourage private party settlements and cleanups. Parties who settle for all or part of a cleanup or its costs, or who pay judgments as a result of litigation, can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement. [Such] parties may be more willing to assume the financial responsibility for some or

> all of the cleanup [*i.e.*, through settlement] if they are assured that they can seek contribution from others.

H.R. Rep. No. 99-253(I), at 80, *reprinted in* 1986 U.S.C.C.A.N., at 2862; S. Rep. No. 99-11, at 44 (same).

> The settlement procedures now set forth are expected to be a significant inducement for parties to come forth, to settle, to avoid wasteful litigation and thus to begin cleanup.
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> . . .
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> The bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site. [Also,] [i]f a party has resolved its liability to the U.S. or a state in a judicially[] approved, good-faith settlement, the party would not be liable for claims for contribution or indemnity on matters addressed in the settlement. *These provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups.*

H.R. Rep. No. 99-253(I), at 58-59, *reprinted in* 1986 U.S.C.C.A.N., at 2840-41 (emphasis added); *see also* H.R. Rep. No. 99-253(III), at 20, *reprinted in* 1986 U.S.C.C.A.N., at 3043 (explaining that "[the] amendments to the contribution section [*i.e.*, § 113] will improve its effectiveness, ensure its fair operation, and encourage settlements by responsible parties"). As Senator Stafford, the floor manager of SARA in the Senate, explained, the legislation recognized that settlements are a crucial part of the EPA's enforcement regime, and "[t]he theory underlying Superfund's liability scheme was, and is, that the Government should obtain the full costs of cleanup from those it targets for enforcement, and leave remaining costs to be recovered in private contribution actions between settling and nonsettling parties." 132 Cong. Rec. S14, 903 (daily ed. Oct. 3, 1986).

* * * * *

Congress no doubt intended by the SARA amendments to encourage settlements, and further intended that the promise of contribution for settling wrongdoers would encourage them to come forward, negotiate a settlement with the Government, and begin work on supervised cleanups. Indeed, the "voluntary" nature of the cleanups Congress had in mind was a voluntary agreement to settle and enter into a consent decree, rather than a wholly voluntary, unsupervised, *sua sponte* cleanup operation. CERCLA's initial legislative history—which is sparse, vague with respect to voluntary cleanups, and leaves issues of joint and several liability (including contribution) to the common law—must, of necessity, be read in tandem with SARA, and SARA establishes a specific and intricate legislative scheme for encouraging settlement through, among other things, a limited contribution right.

c. Contribution for Voluntary Cleanups without Settlement or Suit

To be sure, the legislative history of SARA contains no express statement that parties that clean up their own sites voluntarily, without having settled their liability or having been sued, cannot seek contribution.[26] We conclude, however, that SARA's settlement scheme is inconsistent with such a right.

First, we are mindful of the Supreme Court's caution that "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply

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[26] Of course, as noted, there is no express statement in CERCLA or SARA, or in their respective legislative histories, that PRPs engaged in voluntary cleanups *can* seek contribution.

statutory law, not to create common law." *Northwest Airlines*, 451 U.S. at 95 n.34. The Court continued:

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. *The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.*

Id. at 97 (citation and footnote omitted) (emphasis added). We echoed this understanding in *Reading*. *See* 115 F.3d at 1117 ("[W]hen Congress expressly created a statutory right of contribution in CERCLA § 113(f), 42 U.S.C. § 9613(f), it made that remedy a part of an elaborate settlement scheme aimed at the efficient resolution of environmental disputes. Permitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress.").[27] Indeed, it would be

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[27] DuPont counters with another rule of statutory construction: "that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). It argues that Congress should not be deemed to have rejected a common law implied right of contribution without expressly saying so. In *Reading*, however, we concluded that Congress *did* specifically replace all common law remedies with an express and exclusive statutory remedy, and with good reason: allowing PRPs to seek contribution only within the confines of § 113 provides a powerful incentive for them to settle their liability, a prime goal of SARA.

odd to suppose that Congress would have expressly provided a contribution right for PRPs that settled or were sued as part of an elaborate statutory scheme to encourage settlement if it intended that all other PRPs would be able to obtain contribution under some implied or common law right.

It might be argued, however, that CERCLA's general purpose (i.e., prompt and effective cleanup) is accomplished by any sort of cleanup (whether pursuant to a settlement, in response to a suit, or voluntarily). Under this view, SARA's preference for settlement and its express provision of contribution as an incentive to seek settlement should not be deemed to preclude reconsideration of precedents that, in light of *Cooper Industries*, now serve as a barrier to certain cleanups that would otherwise satisfy the desire for prompt and effective action.

We disagree with this argument. Of particular concern to the Congress that enacted SARA was setting standards likely to effect the safe and effective cleanup of contaminated sites

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Indeed, the legislative history of SARA reveals that Congress approved expressly of certain prior cases, and none of them involved a PRP that voluntarily cleaned up its site without having settled or been sued. The House Energy and Commerce Committee reported that it agreed with *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1986) (which held PRPs jointly and severally liable to the United States and suggested, in keeping with ordinary contribution rules, that upon being held liable a PRP could seek contribution from other PRPs), and *United States v. Ward*, 1984 U.S. Dist. LEXIS 16774, No. 83-63-CIV-5, 1984 WL 15710 (E.D.N.C. May 14, 1984) (which held that a PRP deemed jointly and severally liable can seek contribution from other PRPs under the common law), and explained that § 113 "clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." H.R. Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N., at 2861 (emphasis added); *see also id.* at 74, *reprinted in* 1986 U.S.C.C.A.N., at 2856 (noting that the Committee "fully subscribes to the reasoning" in *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), that PRPs are jointly and severally liable to third parties).

in a manner beneficial to the public interest. *See, e.g.*, CERCLA § 121, 42 U.S.C. § 9621 (requiring "[t]he President [to] select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable," and setting standards for meeting this requirement); *Ohio v. EPA*, 997 F.2d 1520, 1526 (D.C. Cir. 1993) (noting that "the statute . . . require[s] that remedial actions at Superfund sites result in a level of cleanup or standard of control that at least meets the legally applicable or otherwise relevant and appropriate federal (or stricter state) requirements," particularly the "legally 'applicable' or 'relevant and appropriate' environmental standards" in the National Contingency Plan ("NCP")). The House Committee on Public Works and Transportation explained that the EPA must consider, *inter alia*, "the availability of technology, the installation period, the uncertainties related to the level of performance or the solution or remedial action, the level of public support for the solution or remedial action, and whether or not the solution or remedial action has been achieved in practice at any other facility or site which has characteristics similar to the facility or site concerned." H.R. Rep. No. 99-253(V), at 50, *reprinted in* 1986 U.S.C.C.A.N., at 3173.[28]

Indeed, before SARA was enacted, the EPA expressed serious doubts about *sua sponte* voluntary cleanups by PRPs. In the 1983 amendment to the NCP that added the National Priorities List for site cleanup, the EPA explained that, by

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[28] In fact, under CERCLA § 122(e)(6), 42 U.S.C. § 9622(e)(6), Congress expressly forbade, without the EPA's approval, remedial actions by PRPs once an administrative order or consent decree was in place. As Senator Mitchell explained, "[t]his [provision] is to avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." 132 Cong. Rec. S14919 (daily ed. Oct. 3, 1986).

designating certain sites as subject to "Voluntary or Negotiated Response," its strong preference was for negotiated cleanups with Government oversight.[29]

> Sites are included in this category if private parties are taking response actions pursuant to a consent order or agreement to which EPA is a party. Voluntary or negotiated cleanup may include actions taken pursuant to consent orders reached after EPA has commenced an enforcement action. This category of response may include remedial investigations, feasibility studies, and other preliminary work, as well as actual cleanup.
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> Several commenters were concerned that this category did not adequately reflect voluntary response efforts undertaken without formal agreements with EPA. *However, EPA studies have shown that many of the response actions undertaken by private parties outside the sanction of EPA consent agreements have not been successful. Furthermore, some private parties have represented routine maintenance or waste management activities as response actions, thereby leading to the conclusion that only after a thorough technical review can the Agency describe actions by private parties as "responses". Thus, EPA believes that to describe actions taken outside consent orders as "response" would in many instances be misleading to the public[,] as EPA cannot assure the public that the actions are appropriate, adequate, consistent with the NCP, and are being fully implemented.*

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[29] This does not, of course, mean that only *federal* Government oversight is allowed. *See United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1418 (6th Cir. 1991) ("The federal legislative scheme and its history are persuasive that Congress did not intend to leave the cleanup under CERCLA solely in the hands of the federal government. CERCLA, as amended by SARA, provides a substantial and meaningful role for the individual states in the selection and development of remedial actions to be taken within their jurisdictions.").

> Therefore, the Agency encourages any responsible parties who are undertaking voluntary response actions at NPL sites to contact the Agency to negotiate consent agreements.
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> This is not intended to preclude responsible parties from taking voluntary response actions outside of a consent agreement. However, in order for the site to be deleted or to be noted in the voluntary or negotiated response category, EPA must still sanction the completed cleanup. If the remedial action is not fully implemented or is not consistent with the NCP, the responsible party may be subject to an enforcement action. Therefore, most responsible parties may find it in their best interest to negotiate a consent agreement.

Amendment to National Oil and Hazardous Substance Contingency Plan, 48 Fed. Reg. 40,661 (Sept. 8, 1983) (emphasis added).[30]

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[30] Although the EPA treats innocent parties more generously than wrong doing PRPs, it expressed a similar concern with respect to cost recovery by innocent parties in the substantive amendment to the NCP implementing SARA:

> EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination. At the same time, EPA believes it is important to establish a standard against which to measure cleanups that qualify for cost recovery under CERCLA, so that only CERCLA-quality cleanups are encouraged. . . . [Thus,] in evaluating whether or not a private party should be entitled to cost recovery under CERCLA section 107(a)(4)(B), EPA believes that "consistency with the NCP" should be measured by whether the private party cleanup has, when evaluated as a whole, achieved "substantial compliance" with potentially applicable requirements, and resulted in a CERCLA-quality cleanup.
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> . . .

There is, of course, no explicit indication in SARA or the legislative history that Congress was motivated by these concerns in amending CERCLA to encourage settlement. But the import of Congress' scheme (an express desire to oversee cleanups via settlements and other enforcement actions, the explicit promise of contribution as an incentive for PRPs to enter negotiated cleanup agreements, and the desire for quality-control standards for safe, effective, and reliable cleanups) is consistent with the EPA's wariness of wholly voluntary and unregulated cleanups. As the attorneys who prevailed in *Cooper Industries* argue in a recent article,

> [a]ny suggestion that section 107(a) offers some other federal recourse to PRPs seeking a contribution remedy under CERCLA is . . . undermined by the settlement scheme that Congress devised with its enactment of section 113's contribution provision. Specifically, under the SARA amendments, those who settle their cleanup claims with federal or state authorities receive an explicit right of contribution against other PRPs undersection 113(f)(3)(B), as well as statutory protection under section 113(f)(2) from possible future contribution actions by other responsible parties.
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> Protecting the integrity of this legislative scheme to incentivize settlements was a key factor for the federal circuit courts in universally determining that parties responsible for the site contamination may not assert section 107(a) actions seeking to recover their cleanup

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> [T]he government has a strong interest in ensuring that cleanup actions that derive a benefit from CERCLA section 107(a)(4)(B)—a statute under the charge of EPA—are performed in an environmentally sound manner; thus, it is appropriate to provide a standard or measure of consistency with the NCP.

National Oil and Hazardous Substance Contingency Plan, 55 Fed. Reg. 8666, 8792-93, 8794 (March 8, 1990).

> costs from other responsible parties, but must instead . . . seek contribution under section 113(f)(1).

William Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution Under CERCLA After Cooper Industries v. Aviall Services*, 18 Tul. Envtl. L.J. 339, 349-50 (2005) (footnotes omitted) (citing, *inter alia*, *Reading*, 115 F.3d at 1119); *see also id.* at 353 (contending that CERCLA's purpose was never to "encourag[e] wholly unsupervised private remediation activities," but rather to "facilitat[e] government-sponsored cleanups").

To be sure, other courts have concluded that because CERCLA's general goal was to assure prompt and effective cleanups, and *sua sponte* cleanups by PRPs may be prompt and effective, those PRPs must be able to seek contribution. *See, e.g., Atlantic Research Corp. v. United States*, __ F.3d __, 2006 WL 2321185, at *7-9 (8th Cir. Aug. 10, 2006); *Consol. Edison*, 423 F.3d at 99-100; *City of Bangor v. Citizens Communs. Co.*, __ F. Supp. 2d __, 2006 WL 1868332, at *41 (D. Me. June 27, 2006) (citing *Consol. Edison*, 423 F.3d at 100); *Viacom, Inc. v. United States*, 404 F. Supp. 2d 3, 8 (D.D.C. 2005). We believe, however, that a thorough review of CERCLA, as amended by SARA, does not support this conclusion. Congress intended to allow contribution for settling or sued PRPs as a way to encourage them to admit their liability, settle with the Government, and begin expeditious cleanup operations pursuant to a consent decree or other agreement. Our precedents recognize this "elaborate settlement scheme," *see Reading*, 115 F.3d at 1117, and if we were to revisit them now, we would risk upsetting Congress' carefully chosen remedy.[31] In any event, the legislative

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[31] DuPont makes the interesting argument that Congress' scheme effectively allows the federal Government to avoid liability in contribution for its actions as a PRP. It contends that the EPA is generally prohibited from pursuing CERCLA actions against other federal agencies, and thus "the government's liability under CERCLA will almost invari-

history of CERCLA, when read in conjunction with that of SARA, simply does not show that our precedents are at odds with Congress' intent.[32]

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ably be in contribution." Appellants' Br. at 41-42 (citing Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987)). If private PRPs may only seek contribution from the United States (as a PRP) if there is a preexisting action under § 106 or § 107 or settlement under § 113(f)(3)(B), DuPont argues, the Government could use its "many options for exercising its enforcement discretion to avoid governmental liability under CERCLA." *Id.* at 42. As noted in footnote 18 above, the Eighth Circuit accepted this argument recently in *Atlantic Research*, 2006 WL 2321185, at *8.

DuPont does not, however, provide evidence that the EPA actually uses its enforcement discretion to avoid subjecting other federal agencies to potential liability in a later contribution suit (nor did the Eighth Circuit cite such evidence in its decision). Indeed, it would in many cases be difficult for the EPA to do so because, under principles of joint and several liability, the initial suit or settlement does not involve other tortfeasors, who are identified and deemed liable in later proceedings. Also, the federal Government has little or no control over suits by innocent landowners or state enforcement actions, both of which would serve as a predicate for § 113(f)(1) contribution.

[32] Nor do we have cause to reconsider *New Castle County's* holding that cost recovery under § 107 is only available to innocent parties. In *Consolidated Edison*, the Second Circuit found "no basis for reading into [§ 107] a distinction between so-called 'innocent' parties and [PRPs]," and suggested in a footnote that the concern expressed in New Castle County (that it would be illogical to allow a PRP to recover all of its costs on the same basis as an entirely blameless party) was "misplaced," because "there appears to be no bar precluding a person sued under section 107(a) from bringing a counterclaim under section 113(f)(1) for offsetting contribution against the plaintiff volunteer who, if sued, would be liable under section 107(a)." 423 F.3d at 99-100 & n.9. We make three observations.

First, the Second Circuit declined explicitly to consider "whether a three-judge panel of this court may depart from *Bedford Affiliates*'s section 107(a) holding" because it deemed *Bedford Affiliates* factually distinguishable. *Consol. Edison*, 423 F.3d at 100-01 & n.12. But it is hard to see how the later panel could simply assert there is "no basis" for limiting § 107 cost recovery suits to innocent parties when *Bedford*

d. Public Policy Arguments

Of course, it could be that encouraging *sua sponte* voluntary cleanups by capable PRPs is in the public's interest, and would be a better way to protect health and the environment than pressuring them into settlement agreements. This is not self-evident, however. As Judge Sand recently observed, limiting contribution rights to settling or sued PRPs

> would pressure PRPs to settle with some government regarding their own liability for polluting a site, if they wanted to obtain contribution from others also responsible for polluting that site. There is nothing necessarily irrational about requiring a PRP that voluntarily goes to court to obtain cost reimbursement [through

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Affiliates (like our decision in *New Castle County*) plainly held the opposite. *See Bedford Affiliates*, 156 F.3d at 424 ("[O]ne potentially responsible person can never recover 100 percent of the response costs from others similarly situated since it is a joint tortfeasor—and not an innocent party—that ultimately must bear its *pro rata* share of cleanup costs under § 107(a). . . . Congress planned that an innocent party be able to sue for full recovery of its costs [under § 107] while a party that is itself liable may recover only those costs exceeding its *pro rata* share of the entire cleanup expenditure, i.e., contribution under § 113(f)(1).").

Second, the Second Circuit's proposed procedure—allowing a PRP "volunteer" to obtain full cost recovery, but then subjecting it to a counterclaim by other PRPs for "offsetting contribution" to avoid unjust enrichment—seems quite unwieldy and is, in any event, not contemplated by CERCLA or SARA.

Third, and perhaps most importantly, although another Circuit's views are entitled to due weight by our Court, they are not "intervening authority" that would justify our reconsideration of our precedents without *en banc* review. Indeed, we note that at least one other Circuit Court has agreed with our interpretation of § 107(a) in a case decided after *Consolidated Edison*. *See Elementis Chromium L.P. v. Coastal States Petrol. Co.*, 450 F.3d 607, 613 (5th Cir. 2006) ("[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a), and the imposition of joint and several liability is inappropriate." (internal quotation marks omitted) (alteration in original)).

> contribution], as opposed to being dragged into court by another party, to either prove its 'innocence' . . . or officially admit its 'guilt' (via a settlement); such a forced choice would be entirely consistent with Congress's intent.

Elementis Chems., Inc. v. TH Agric. & Nutrition, L.L.C., 373 F. Supp. 2d 257, 272 (S.D.N.Y. 2005).

But we need not linger on this particular issue. The fact that DuPont and the other appellants, if they are allowed contribution for response costs voluntarily incurred, may be capable of reaching a good result without the Government oversight provided for in SARA, is not a reason to reconsider our prior holdings that the statute precludes such causes of action. And, in any event, the debate over whether our national environmental cleanup laws should favor prompt and effective cleanups in any manner (including *sua sponte* voluntary cleanups by PRPs), or should favor settlements and other enforcement actions to ensure that wrongdoers admit their fault and fix the problem under the aegis of Government oversight, is a matter for Congress, not our Court. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) ("The policy questions presented by petitioner's claimed right to contribution are far-reaching. In declining to provide a right to contribution, we neither reject the validity of those arguments nor adopt the views of those opposing contribution. Rather, we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve."). Congress sets policy. We steer clear of such matters, as our function is to interpret the statutes Congress enacts to reflect its policy choices.

* * * * *

Having determined that *New Castle County* and *Reading* control this case, and that neither the Supreme Court's decision in *Cooper Industries* nor the purpose of CERCLA (as amended by SARA) provide cause to reexamine those

precedents, we must refuse DuPont's invitation to imply a cause of action for contribution under § 107 or the common law available to PRPs engaged in *sua sponte* voluntary cleanups. We are aware, of course, that other courts have held differently, but we do not believe those decisions can be reconciled with SARA.

V. Judgment on the Pleadings

Because appellants cannot seek contribution for their voluntary cleanup efforts (and, hence, the District Court's December 30, 2003 order, as amended on January 8, 2004, must be affirmed), we proceed to consider whether the District Court erred in granting the Government judgment on the pleadings with respect to the remaining fourteen sites at issue in this litigation. Our review of judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is "confined to the allegations in the pleadings," and we "must accept [the non-movant's] version of events as true." *Consol. Rail Corp. v. Portlight, Inc.*, 188 F.3d 93, 98 (3d Cir. 1999). The motion should be granted if "there is no material issue of fact to resolve," *Mele v. Fed. Res. Bank of N.Y.*, 359 F.3d 251, 253 (3d Cir. 2004) (internal quotation marks omitted), and neither we nor the District Court may "consider matters extraneous to the pleadings" in deciding whether there are material facts in dispute. *Id.* at 256 n.5 (internal quotation marks omitted).

The District Court concluded that, although appellants asserted they could introduce evidence that some of the other sites were being cleaned up pursuant to EPA consent decrees (and thus might qualify for § 113(f)(1) contribution), they never did introduce that evidence, nor did they seek to amend their complaint. Thus, based solely on the pleadings, the District Court granted judgment to the Government because appellants' complaint did not allege any facts that would suggest the circumstances of the cleanups at other sites were different from those at DuPont's Louisville facility. DuPont

argues that, since discovery had not yet proceeded with respect to any of the other sites, it was premature to conclude that the circumstances at those sites were the same as in Louisville. This is not, however, what the District Court concluded. Rather, it rightly noted that appellants bore the burden of pleading facts sufficient to show they could obtain § 113 contribution. Surely they did not need discovery to determine whether cleanups at some of their sites were pursuant to a suit, settlement, or consent decree.

A straightforward reading of appellants' complaint reveals no allegation that any site was cleaned up pursuant to some kind of suit or settlement. The complaint merely describes the Government's alleged actions that contributed to contamination at each site, without any reference to the current cleanup operations. The only discussion of the cleanup operations reveals that appellants "have undertaken, and are undertaking, response actions with respect to the Facilities in response to releases or threatened releases of hazardous substances, and have incurred and are incurring necessary costs of response consistent with the NCP." Thus, based solely on the pleadings, appellants have not set out facts sufficient to demonstrate, even by inference, that they could possibly prevail on their claim for contribution under § 113.[33]

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[33] After this appeal was filed, the Government learned that in 2001 the EPA sued DuPont under § 107(a) regarding contamination at the Necco Park facility in Niagara, New York. *See* Gov't Br. at 57 n.25. Thus, the Government recommends that any dismissal of DuPont's claim with respect to that site be without prejudice. Since the EPA brought suit in 2001 (two-and-a-half years before the District Court issued its final judgment in this case), we are reluctant to allow DuPont a second bite at this apple for the same reasons we believe its claims with respect to the other facilities were properly dismissed. The Government nonetheless is willing to subject itself to a suit for contribution regarding the Necco Park facility. In this context, and even though DuPont (surprisingly) did not bring the suit to the District Court's attention, we abide the Government's

VI. Conclusion

We are not, of course, unsympathetic to the policy arguments made by appellants. Nothing in our decision, however, forces them to sit on contaminated sites and wait to be sued, endangering public health all the while. They can, consistent with SARA, approach the EPA or a state environmental agency and settle their liability, and then seek contribution from others. If indeed they desire to be good corporate citizens (which their *sua sponte* voluntary cleanups suggest is the case), we have little doubt they will seek settlement rather than wait to be sued. They are not, of course, guaranteed terms in a settlement as favorable as those they would enjoy if they cleaned up a contaminated site entirely on their own, but this is an inescapable consequence of Congress' plan. That plan, recognized and protected in our precedents, was left untouched (and arguably strengthened) by *Cooper Industries*, and we therefore have no cause to reconsider our precedents here.

For these reasons, the District Court's December 30, 2003 order (as amended on January 8, 2004) is affirmed. Its March 1, 2004 order is also affirmed, with the caveat that the District Court's dismissal of the contribution claim regarding DuPont's Necco Park facility in Niagara, New York is converted to a dismissal without prejudice.

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request. Insofar as the Necco Park facility is concerned, the District Court's March 1, 2004 order is converted to a dismissal without prejudice.

SLOVITER, *Circuit Judge*, dissenting.

Judge Ambro has written a fine opinion in support of the majority's position that plaintiff DuPont does not have a right to contribution from the United States for its voluntary cleanup of a site that was polluted by the United States as well as by DuPont. I reach a conclusion different from that reached by the majority and write so that this view can be considered along with that of the majority. Because Judge Ambro's opinion fully sets forth the legal background, I make every effort to avoid repetition.

The majority concludes that DuPont cannot maintain this action against the United States for contribution for cleanup costs under *CERCLA* § 107 because of our decisions in *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997), and *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997). Although this court adheres strictly to our precedents, we have made clear that those precedents may be reevaluated when there has been intervening authority. *See George Harms Constr. Co. v. Chao*, 371 F.3d 156, 161 (3d Cir. 2004) ("We recognize that we may reevaluate a precedent in light of intervening authority even without en banc consideration."); *Reich v. D. M. Sabia Co.*, 90 F.3d 854, 858 (3d Cir. 1996) ("Although a panel of this court is bound by, and lacks authority to overrule, a published decision of a prior panel . . . , a panel may reevaluate a precedent in light of intervening authority[.]").

Such reevaluation of precedent is appropriate here even though, as the majority correctly notes, we must be particularly cautious in revisiting cases involving questions of statutory interpretation. Indeed, the Supreme Court has noted that in certain circumstances courts may appropriately overrule statutory precedents. It has explained that in "cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of

judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted).

The Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), is such intervening authority. It should impel us to reevaluate our precedent because *Cooper Industries* weakens the conceptual underpinnings of our decisions in *Reading* and *New Castle County*. For that reason, and because our holdings in *Reading* and *New Castle County* cannot be reconciled with the policies Congress sought to encourage when it enacted CERCLA, I believe this court can and should reconsider those opinions.

There is nothing in the relevant language of § 107 that compels the result the majority reaches. Section 107 states that various parties, including the owner or operator of a facility, may be responsible for "any . . . necessary costs of response incurred by any other person consistent with the national contingency plan," § 107(a)(4)(B), and provides a cause of action to parties that incur cleanup costs but have not themselves been sued under § 106 or § 107.[34] For years after

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[34] In *New Castle County*, we stated only that innocent parties may bring suit under § 107. Our imposition of the "innocent" standard on parties seeking to bring suit under § 107 is not based on the statutory text. Arguably, the "innocent" standard imposed by this and other circuits violates fundamental rules of statutory construction by imposing a requirement not evident on the statute's face. This court-created standard ignores the fact that § 107(a)(4)(B) plainly allows a private party plaintiff to be "any other person" besides the government, state, and Indian tribes and does not expressly exclude parties that may be responsible for a spill. Moreover, courts that adopt this standard narrowly interpret § 107 and ignore that CERCLA is a remedial statute, which courts are to construe

the 1980 enactment of CERCLA, district courts almost unanimously found that § 107 contained an implied cause of action for contribution. *See, e.g., United States v. New Castle County*, 642 F. Supp. 1258, 1265-69 (D. Del. 1986) (holding that contribution right arises under federal common law); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484 at 1489 (D. Colo. 1985) (same); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (holding that contribution right is implied from language of § 107(e)(2)). With the enactment of § 113, the courts turned to that section rather than to § 107 to provide the cause of action.

In *New Castle County*, this court stated that § 113 provided a "potentially responsible person[] with the appropriate vehicle" to "recoup that portion of its expenditures which exceeds its fair share of the overall liability." 111 F.3d at 1122. We further held that "a section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken clean-ups." *Id.* at 1120. Similarly, in *Reading*, we held that a potentially responsible party may not seek contribution under § 107(a)(4)(B). In fact, we stated "§ 113(f)(1) specifically permits an action for contribution to be brought in the absence of civil action under section 107." 115 F.3d at 1120 (internal punctuation and quotation marks omitted).

The trend toward application of § 113 was halted by the Supreme Court's decision in *Cooper Industries*, where the Court held that the plain language of § 113(f)(1) does not allow liable parties to bring contribution actions unless and until a related civil action is brought against them under either § 106 or § 107. The Court reserved judgment on the question whether liable parties who are not subject to an action under § 106 or § 107 may instead seek relief under § 107(a)(4)(B).

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liberally in order to achieve its intended purposes—namely the prompt cleanup of hazardous sites.

Cooper Industries clearly undermined our opinions in *Reading* and *New Castle County*. In those cases, we assumed that all potentially responsible parties—those whose responsibility had been adjudicated and those who voluntarily admitted their responsibility—fell into the same category of "potentially responsible parties" who could recoup losses by bringing suit pursuant to § 113(f). The Supreme Court's decision in *Cooper Industries* established that our understanding of the category "potentially responsible parties" was incorrect. *Cooper Industries* holds that a party who has in fact been held responsible (via adjudication or settlement with the EPA) may bring an action under § 113(f), while a party who admits responsibility but whose responsibility has not been established may not. *Cooper Industries* highlights the fact that the term "potentially responsible party" is "vague and imprecise because, when no action has been filed nor fact-finding conducted, *any* person is *conceivably* a responsible party under CERCLA." *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90, 97 n.8 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3600 (U.S. Apr. 14, 2006) (No. 05-1323).[35]

In addition, *Reading* and *New Castle County* are clearly factually distinguishable from the situation before us. In *New Castle County*, plaintiffs already had been sued by the Government and then brought an action against other poten-

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[35] The majority holds that our erroneous observation in *Reading* that "§ 113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under. . . *section [107]*,'" 115 F.3d at 1120, does not fatally undermine *Reading*'s holding. I respectfully disagree. *Cooper Industries* clearly establishes that § 113(f) did not, as we stated, "replace[] the judicially created cause of action under § 107(a)(4)(B) to the extent that a party seeks contribution." *Reading*, 115 F.3d at 1120. That judicially created cause of action was available to parties that had not been sued under § 106 or § 107. Our broad reading of § 113(f) in *Reading* is fundamentally at odds with the Supreme Court's understanding of § 113(f) in *Cooper Industries*.

tially responsible parties to recover response costs under § 107(a)(4)(B). This court held that plaintiffs could not assert a cause of action under § 107 and restricted them to making a claim for contribution under § 113(f). *See* 111 F.3d at 1116. Similarly, in *Reading*, the plaintiff had already been sued under § 107. *See* 115 F.3d at 1116. In the instant case, DuPont has not been ordered to undertake remedial action. Rather, it voluntarily cleaned up numerous hazardous sights. Any statements this court made regarding the ability of parties against whom § 106 or § 107 actions had not been brought to sue under § 107 or § 113 were not necessary to answer the questions presented by those cases and need not govern our analysis in this case.

Two of our sister circuits have recently considered the same issue presented here and both have decided, contrary to the majority, that *section 107(a)* can be used by a responsible party to seek contribution from another responsible party. In *Consolidated Edison*, the Court of Appeals for the Second Circuit unanimously held,

> We believe . . . that Con Ed may pursue its suit under section 107(a) because, in light of *Cooper Industries*, Con Ed's costs to clean up the sites of the Westchester Plants are "costs of response" within the meaning of that section.

423 F.3d at 97.

The Second Circuit, like this court, had held, before the *Cooper Industries* decision, that CERCLA section 113(f) governs contribution actions and that the plaintiff could not pursue a section 107(a) cost recovery claim against the defendants. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998). The Supreme Court's decision in Cooper Industries convinced the Second Circuit to change its view. As the court explained in *Consolidated Edison*:

> [The *Cooper Industries*] decision impels us to conclude that it no longer makes sense to view section 113(f)(1) as the means by which section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under section 107(a).

423 F.3d at 99. The court further stated that it "would be impermissibly discouraging voluntary cleanup were we to read section 107(a) to preclude parties that, if sued, would be held liable under section 107(a) from recovering necessary response costs." *Id.* at 100.

The court thus concluded, "that section 107 permits a party that has not been sued or made to participate in an administrative proceeding, but that if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment." *Id.*

Just this month, the Court of Appeals for the Eighth Circuit, again unanimously, reached a similar conclusion. In *Atlantic Research Corp. v. United States*, the court held that: "[A] private party which voluntarily undertakes a cleanup for which it may be held liable, thus barring it from contribution under CERCLA's § 113, may pursue an action for direct recovery or contribution under § 107, against another liable party." No. 05-3152, 2006 WL 2321185, at *9 (8th Cir. 2006).

Atlantic Research, the plaintiff in the Eighth Circuit decision, was in a position almost identical to that of DuPont here in that it sought to recover contribution for cleanup from the United States for cleanup services it performed at a facility where it retrofitted rocket monitors for the United States. The court, like the Second Circuit in *Bedford Affiliates*, had held in *Dico, Inc. v. Chemical Co.*, 340 F.3d 525, 531 (8th Cir. 2003), that a liable party could not bring an action under section 107. The Eighth Circuit, like the Second Circuit, re-

considered that earlier holding in light of the decision in *Cooper Industries* and did an about face. I believe that this court's earlier decisions in *New Castle County* and *In re Reading Co.* are similarly superseded by the decision in *Cooper Industries*.

Both the Second and the Eighth Circuits's decisions cited the Supreme Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994). In that case, which concerned attorney's fees under CERCLA, the Supreme Court recognized that a potentially responsible party could seek recovery of response costs under § 107, but the Justices differed as to whether there was an express or implied cause of action. Justice Ginsburg, in her dissent in *Cooper Industries*, stated that every Member of the Court in *Key Tronic* agreed that a potentially responsible party which incurred necessary costs could recover those costs from another liable party in an action under § 107(a). *Cooper Industries*, 543 U.S. at 172. Significantly, the plaintiff in *Key Tronic* was a party responsible for polluting and was still permitted to bring suit under § 107. As the Court of Appeals for the Second Circuit recently stated, *Cooper Industries* and the text of § 107 clearly "impel[] us to conclude that it no longer makes sense to view section 113(f)(1) as the means by which the section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under section 107(a)." *Consolidated Edison*, 423 F.3d at 99. Rather, § 107(a) and § 113(f)(1) embody mechanisms for cost recovery available to persons in different procedural postures. *Id.*

Contrary to the majority, I believe that permitting parties who voluntarily incur cleanup costs to bring suit under § 107 comports with the fundamental purposes of CERCLA. As this court noted in *Horsehead Industries, Inc. v. Paramount Communications, Inc.*, 258 F.3d 132 (3d Cir. 2001):

> The purpose of CERCLA is "to assure that the current and future costs associated with hazardous waste facil-

> ities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities."

Id. at 135 (quoting 42 U.S.C. § 9607(k)(6)(E)); *see OHM Remediation Services v. Evans Cooperage Co.*, 116 F.3d 1574 (5th Cir. 1997) (noting CERCLA's broad, remedial purpose to facilitate prompt cleanup of hazardous waste sites and to shift costs of environmental response from taxpayers to parties who benefitted from wastes that caused harm); *see also In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 206 (3d Cir. 2003) (stating that CERCLA's purpose is "making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created") (citation and quotation marks omitted).

Voluntary cleanups are vital to fulfilling CERCLA's purpose. During deliberations on the SARA Amendments, Congress emphasized the importance of voluntary action, stating that "[v]oluntary cleanups are essential to a successful program for clean up of the Nation's hazardous substance pollution problem." H.R. Rep. No. 99-253, pt. 5, at 58 (1985); *see also* 131 Cong. Rec. 24725, 24730 (1985) (statement of Sen. Domenici) ("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.").

The majority reads the legislative history of SARA as strongly indicating that Congress did not mean to encourage unsupervised voluntary cleanups, but rather cleanups within the bounds of settlement agreements. *See* Maj. Op. at IV.B.2(b). The majority notes that the EPA expressed serious

doubts about the efficacy of voluntary cleanups by parties.[36] *See* Maj. Op. at IV.B.2(c). These assertions, part of a long and fractious legislative history, are not dispositive. Though supervised cleanups are to be encouraged wherever possible, they need not be encouraged at the expense of unsupervised cleanups. Section 107(a)(4)(B) holds a party liable for costs incurred in a cleanup (voluntary or otherwise) only insofar as those costs are "costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(B). A party that seeks contribution for costs incurred in a cleanup that does not comport with the national contingency plan is without recourse.[37]

The position urged by DuPont here is an alternative and equally effective, albeit voluntary, method of assuring cleanup in compliance with CERCLA. *See Kotrous v. Goss-Jewett Co. of N. Cal.*, No. Civ. S02-1520, 2005 WL 1417152, at *3 (E.D. Cal. June 16, 2005) (holding that a potentially responsible party may maintain a claim for contribution under § 107(a)); *Metro. Water Reclamation Dist. v. Lake River Corp.*, 365 F. Supp. 2d 913, 918 (N.D. Ill. 2005) (explaining that "although PRP's are not explicitly named in § 107(a), there seems to be no reason why they would be excluded from the provision that allows recovery for any person"); *Vine St. LLC v. Keeling*, 362 F. Supp. 2d 754, 761-64

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[36] The EPA's approach to voluntary cleanups has varied. The majority argues that the EPA was wary of such cleanups prior to the enactment of SARA. However, the EPA has also expressed concern that the position advocated by the United States and adopted by the Supreme Court in *Cooper Industries* could undermine EPA's voluntary cleanup program by removing an incentive for liable parties to voluntarily clean up contaminated sites because it would make it more difficult to seek reimbursements. *See Ruling on Superfund Costs May Boost Push for Supreme Court Review*, INSIDE THE EPA, Jan. 9, 2004, sec. 2, *available at* 2004 WLNR 70249.

[37] By the plain text of the statute, parties that fail to meet the national contingency plan standards cannot be reimbursed for such activities.

(D. Tex. 2005) (holding that potentially responsible party could bring claim under § 107(a)); *cf. Atl. Research Corp. v. United States*, No. 02-CV-1199, 2005 U.S. Dist. LEXIS 20484, at *10 (W.D. Ark. June 1, 2005) (suggesting the Eighth Circuit revisit its precedents after noting "that the result . . . is patently unfair to ARC, because it has voluntarily cleaned up environmental contamination, yet it is left without a CERCLA remedy against the United States, another PRP").

As the majority itself notes, SARA was "not intended to preclude responsible parties from taking voluntary response actions outside a consent agreement." Maj. Op. at IV.B.2(c). I am concerned that the effect of the majority's opinion will be that parties will be reluctant to engage in voluntary cleanups for fear that they may not be able to obtain contribution. Spills that could be most efficaciously dealt with if cleaned up immediately will remain untouched while parties attempt to settle with the Government. This result is contrary to the purpose of CERCLA. Therefore, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3152

ATLANTIC RESEARCH CORP.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Western District of Arkansas

Submitted: March 16, 2006
Filed: Aug. 11, 2006

Before WOLLMAN and RILEY, *Circuit Judges*, and ROSENBAUM,[1] *District Judge*.

ROSENBAUM, *District Judge*.

Atlantic Research Corporation ("Atlantic") seeks partial reimbursement from the United States for costs incurred in an environmental cleanup. Atlantic's claim is based on the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (2005), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613, 1615. The issue for consideration is whether CERCLA forbids a party such as Atlantic, which has voluntarily

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[1] The Honorable James M. Rosenbaum, *Chief Judge*, United States District Court for the District of Minnesota, sitting by designation.

cleaned up a site for which it was only partly responsible, to recover part of its cleanup costs from another liable party.[2] For the reasons that follow, we hold that CERCLA § 107 permits such a cause of action.

I. Background

Atlantic retrofitted rocket motors for the United States from 1981 through 1986. It performed this service at its Camden, Arkansas, facility. The work included using high-pressure water spray to remove rocket propellant. Once removed, the propellant was burned. Residue from burnt rocket fuel contaminated the Arkansas site's soil and groundwater.

Atlantic voluntarily investigated and cleaned up the contamination, incurring costs in the process. It sought to recover a portion of these costs from the United States by invoking CERCLA §§ 107(a) and 113(f).[3] Atlantic and the government began to negotiate in an effort to resolve these financial matters.

The negotiations ended with the United States Supreme Court decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004) ("*Aviall*"). In *Aviall*, the court found a party could only attempt to obtain § 113(f) contribution "during or following" a §§ 106 or 107(a) CERCLA civil action. *Id.* at 161, 125 S.Ct. at 580. As no action had been commenced against Atlantic under either §§ 106 or 107(a), the *Aviall* decision barred its § 113(f) contribution claim.

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[2] The district court dismissed this matter on the government's Rule 12(b)(6) motion. As such, the court assumed the facts most favorably to Atlantic, the non-moving party. We do the same; and therefore, assume, but do not decide, that the United States would be liable under CERCLA.

[3] These sections have been codified at 42 U.S.C. §§ 9607(a) and 9613(f). For convenience, this Opinion refers to the statute sections as designated in CERCLA, rather than as later codified.

With its § 113(f) claim *Aviall*-foreclosed, Atlantic amended its complaint. The amended complaint relied solely on § 107(a) and federal common law. In lieu of answer, the government moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing this Court's pre-*Aviall* decision in *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003) ("*Dico*") foreclosed Atlantic's § 107 claim. The district court agreed. Atlantic appeals.

As will be discussed in more detail below, *Dico* held that a liable party could not bring an action under § 107. *Dico*, 340 F.3d at 531. We recognize the generally preclusive effect of a previous panel's ruling. *United States v. Blahowski*, 324 F.3d 592, 596-97 (8th Cir. 2003). But this rule is not inflexible. Where the prior decision can be distinguished, or its rationale has been undermined, a subsequent decision can depart from the prior path.[4] We are convinced *Dico* is such a case; it is clearly distinguishable from the case at bar, and its analytic is undermined by *Aviall.*

II. Analysis

As this case turns on the interpretation of CERCLA, a federal statute, our review is de novo. *Iowa 80 Group, Inc. v. Internal Revenue Service*, 406 F.3d 950, 952 (8th Cir. 2005). We undertake this review, recognizing our obligation to effectuate the intent of Congress when interpreting federal statutes. *Id.* To resolve the question before us, we must

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[4] "[I]t is well settled that a panel may depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent." *T.L. v. United States*, 443 F.3d 956, 960 (8th Cir. 2006), *citing Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). As will be seen, while *Aviall* has undermined *Dico*'s reasoning for parties in Atlantic's position, its holding remains viable for those parties which still have recourse to relief under § 113. Accordingly, *Dico* can be reconciled with our present holding and we need not ultimately answer whether *Aviall* compels reconsideration of *Dico.*

briefly review the intertwined history of CERCLA §§ 107 and 113, and then analyze this history in light of *Aviall*.

A. CERCLA Cost Recovery and Contribution—Pre-*Aviall*

CERCLA is Congress's monumental attempt to "encourage the timely cleanup of hazardous waste sites," and "place the cost of that response on those responsible for creating or maintaining the hazardous condition." *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935-36 (8th Cir. 1995) (internal quotations and citations omitted). To achieve these ends, CERCLA effectively transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others. *See* Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 Wake Forest L.Rev. 903 (2004); Ronald G. Aronovsky, *Federalism & CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 Ecology L.Q. 1, 9 (2006).

When the federal or a state government conducts the cleanup, CERCLA permits the sovereign to recover its costs from whomever is liable for the contamination. § 107(a)(4)(A). CERCLA also provides three methods by which private parties may recover cleanup costs. The first is found at § 107(a)(4)(B), a part of the original statute in 1980. Congress added the others, §§ 113(f)(1) and 113(f)(3)(B), as part of SARA.[5]

Sections 107(a) and 113(f)(1) are central to our analysis. The Eighth, and many of its sister Circuits, have previously held that liable parties seeking reimbursement must use § 113(f)(1), and may not use § 107 for that purpose. Today,

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[5] The last of these, § 113(f)(3)(B), concerns the rights of settling parties. As the parties in this case have obviously not reached a settlement, § 113(f)(3)(B) is not examined here.

we consider whether this ruling remains viable in the post-*Aviall* world.

CERCLA's § 107(a) provides that "covered persons," which we will call "liable parties,"[6] are liable for, among other things:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan[.]

§ 107(a)(4)(A),(B). Courts have found in CERCLA's reference to "any other necessary costs of response" and "any other person," authority to allow private suits under § 107(a)(4)(B). *See Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (collecting cases).

Section 113 contains a subsection entitled "Contribution," the first part of which states:

> Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], during or following any civil action under [§§ 106 or 107(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving

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[6] Many prior opinions have called these "potentially responsible parties" (abbreviated "PRP"). We decline to use this term. The PRP term has been developed by the courts. It is not found in CERCLA. The term refers to "a party who may be covered by the statute at the time the party is sued under the statute." *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 773 n .2 (4th Cir. 1998). After *Aviall*, the term has been weakened and "may be read to confer on a party that has not been held liable a legal status that it should not bear." *Consolidated Edison Co. c. UGI Utils., Inc.*, 423 F.3d 90, 98 n. 8 (2d Cir.2005).

> contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§§ 106 or 107].

§ 113(f)(1).

There is some similarity in the remedial responsibilities borne by liable parties under §§ 107(a) and 113(f). The Supreme Court has termed these sections' remedies "similar and somewhat overlapping," yet "clearly distinct." *Compare Key Tronic Corp. v. United States*, 511 U.S. 809, 816, 114 S.Ct. 1960, 1966, 128 L.Ed.2d 797 (1994) *with Aviall*, 543 U.S. at 163 n. 3, 125 S.Ct. at 582 n. 3. Each requires proof of the same elements. *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996). They differ, however, in procedure and scope.

1. Section 107(a) Remedies

Section 107(a) has a six-year statute of limitations, and allows a plaintiff to recover 100% of its response costs from all liable parties, including those which have settled their CERCLA liability with the government. §§ 113(g)(2), 107(a). Prior to SARA's enactment, some courts implied a right to contribution from § 107, *see Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n. 3 (9th Cir. 1986) (collecting cases), or as a matter of federal common law. *United States v. New Castle County*, 642 F.Supp. 1258, 1265-66 (D.Del. 1986). The right initially was thought to be uncertain in light of the Supreme Court's traditional reluctance to imply rights of action in the context of other statutes. *See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40, 101 S.Ct. 2061, 2066, 68 L.Ed.2d 500 (1981) (declining to imply an antitrust right of action for contribution).

2. Section 113 Remedies

Congress resolved the uncertainty when enacting SARA in 1986 by adding § 113 to "clarif[y] and confirm" a right to CERCLA contribution. *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994), citing S.Rep. No. 11, 99th Cong., 1st Sess. 44 (1985). Section 113's explicit right to contribution is more restricted than that afforded by § 107. Section 113's right is subject to a three-year statute of limitations; plaintiffs can recover only costs in excess of their equitable share, and may not recover from previously-settling parties. § 113(f)(1), (f)(2), (g)(3).

3. The Section 107(a)/Section 113 Conflict—Pre-Aviall

Congress's addition of § 113 posed a dilemma. Courts saw that CERCLA, as amended, created a situation where litigants might "quickly abandon section 113 in favor of the substantially more generous provisions of section 107," thus rendering § 113 a nullity. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997).

To prevent § 107 from swallowing § 113, courts began directing traffic between the sections. *See id.; United Techns.*, 33 F.3d at 101; *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998). As a result, regardless of which CERCLA section a plaintiff invoked, courts typically analyzed §§ 107 and 113 together, aiming to distinguish one from the other. *See Bedford Affiliates*, 156 F.3d at 424; *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 347 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-02 (9th Cir. 1997); *New Castle County*, 111 F.3d at 1121-22; *Redwing Carriers*, 94 F.3d 1489, 1513 (11th Cir. 1996); *United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1534-35 (10th Cir. 1995); *United Techns.*, 33 F.3d at 99; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764

(7th Cir. 1994); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989).

Traffic-directing dramatically narrowed § 107 by judicial fiat. On its face, § 107(a)(4)(B) is available to "any . . . person" other than the sovereigns listed in § 107(a)(4)(A). *See Control Data Corp.*, 53 F.3d at 936 n. 9. In practice, however, courts gradually steered liable parties away from § 107 and required them to use § 113; § 107 was reserved for "innocent" plaintiffs who could assert one of the statutory defenses to liability. *See Bedford Affiliates*, 156 F.3d at 424; *Pinal Creek*, 118 F.3d at 1301; *New Castle County*, 111 F.3d at 1124; *Redwing Carriers*, 94 F.3d at 1496; *Centerior Service*, 153 F.3d at 349; *United Techns.*, 33 F.3d at 100; *Akzo Coatings*, 30 F.3d at 764-65. This cramped reading of § 107 prevented liable parties from using it to evade § 113's Congressionally-mandated constraints, thus preserving the vitality of § 113. *See New Castle County*, 111 F.3d at 1121; *Colo. & Eastern*, 50 F.3d at 1538; *United Techns.*, 33 F.3d at 98.

In the pre-*Aviall* analysis, § 113 was presumed to be available to all liable parties, including those which had not faced a CERCLA action. *See Akzo Coatings*, 30 F.3d at 763 n. 4 (liable party's § 113 claim for costs voluntarily incurred held barred by settlement); *Pinal Creek*, 118 F.3d at 1306 (liable party's claim for costs voluntarily incurred governed by both §§ 107 and 113). Accordingly, most courts concluded liable parties could not use § 107. *See Pnuemo Abex*, 142 F.3d at 776 (collecting cases); *but see Pinal Creek*, 118 F.3d at 1302 (holding liable parties could not seek direct recovery under § 107, but that "§ 107 implicitly incorporates a claim for contribution" which remains available to liable parties through combined operation of both sections); *United Techns.*, 33 F.3d at 99 n. 8 (suggesting, in dicta, that a liable party may bring contribution action under § 107).

Our opinion in *Dico* was the last in this pre-*Aviall* line. The Environmental Protection Agency ("EPA") had forced Dico, Inc., and another party to clean up an Iowa site which both had contaminated. Dico sued the other party, seeking direct recovery of 100% of its costs under § 107 and for contribution under § 113. The other party settled with the EPA and moved for summary judgment in Dico's lawsuit. The district court granted the motion. It found Dico's § 113 claims were barred by the settlement and, as a liable party, Dico had no right to recover its full cleanup cost under § 107.

Dico appealed the dismissal of its § 107 claim, arguing the Supreme Court's opinion in *Key Tronic* allowed liable parties a claim in direct recovery. We disagreed, noting *Key Tronic* dealt with a pre-SARA implied right to § 107 contribution. *Dico*, 340 F.3d at 531. When we affirmed the dismissal, we joined other Circuits in narrowly construing § 107, and holding a liable party may only assert a contribution claim under § 113. *Id.* at 530, citing among others *Bedford Affiliates*, 156 F.3d at 424; *Centerior Service*, 153 F.3d at 350; *Pinal Creek*, 118 F.3d at 1306; *Redwing Carriers*, 94 F.3d at 1496; *Colorado & Eastern*, 50 F.3d at 1536; *United Techns.*, 33 F.3d at 101; *Akzo Coatings*, 30 F.3d at 764; and *Amoco Oil*, 889 F.2d at 672. We now see that *Aviall* undermines *Dico*, and the judge-created analytic upon which it relies.

B. The Effect of *Aviall*

Aviall's facts are similar to those at hand. Aviall Services, Inc., purchased contaminated aircraft maintenance sites from Cooper Industries. The Texas Natural Resource Conservation Commission directed Aviall's efforts at environmental cleanup, but neither the Commission, the EPA, nor any private party brought a CERCLA action against Aviall.

After the cleanup, Aviall sued Cooper for both cost recovery under § 107 and contribution under § 113. It later amended its complaint, seeking recovery only under § 113, assuming—based on Circuit precedent—that its § 107 rights

would be preserved in the § 113 claim. The district court granted Cooper's motion for summary judgment, holding Aviall had no right to § 113 relief absent a prior §§ 106 or 107 CERCLA enforcement action, and that Aviall's amended complaint abandoned any potential § 107 claim. A Fifth Circuit panel's affirmance was reversed, en banc.

On certiorari, the Supreme Court reversed again. Justice Thomas, writing for a seven-member majority, construed § 113's "during or following" language. He said, "[t]he natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." *Aviall*, 543 U.S. at 165-66, 125 S.Ct. at 583. The Court found the words "during or following" established a condition precedent to a § 113(f) claim. As such, a court which allowed a § 113 contribution claim, absent the prior §§ 106 or 107 action, would render § 113's precondition a nullity.

Having made this determination, the Court turned to its previous *Key Tronic* reference to CERCLA's "similar and somewhat overlapping" remedies. The Court explained that §§ 107's and 113's remedies were only "similar" in that "both allow private parties to recoup costs from other private parties." *Id.* at 163 n. 3, 125 S.Ct. at 582 n. 3. The Court carefully noted, however, that "the two remedies are clearly distinct." *Id.*

Dissenting Justices Ginsburg and Stevens analyzed *Key Tronic* differently. They said the *Key Tronic* court had not questioned whether § 107 afforded liable parties a cause of action against other liable parties. It simply disagreed whether the right was implied or explicit. *Id.* at 172, 125 S.Ct. at 586-87. Justices Ginsburg and Stevens did not agree that Aviall's amended complaint abandoned a § 107 claim, which they would have allowed to proceed. *Id.* at 174. The majority explicitly avoided this question, *see id.* at 173-74, 125 S.Ct. at 587-88, reserving it for another day.

C. The Matter At Hand

That day has arrived. We now ask: Can one liable party recover costs advanced, beyond its equitable share, from another liable party in direct recovery, or by § 107 contribution, or as a matter of federal common law?

The Second Circuit is the only Court which has considered this question since *Aviall.*[7] That Court revisited its pre-*Aviall* precedent, much as we have done here, and concluded that § 107 allowed one liable party to recover voluntarily incurred response costs from another. *Consolidated Edison Co. v. UGI Utilities, Inc.,* 423 F.3d 90, 100 (2d Cir.2005). In reaching this conclusion, the court distinguished its holding in *Bedford Affiliates,* which—like *Dico*—had rejected a liable party's direct recovery claim under § 107. *Id.* at 102.

In light of *Aviall*'s holding that §§ 107 and 113's remedies are distinct, the Second Circuit held "it no longer makes sense" to view section 113(f)(1) as the exclusive route by which liable parties may recover cleanup costs. *See Consolidated Edison Co.*, 423 F.3d at 99. The court looked to Section 107(a)(4)(B)'s "any other person" language, and found "no basis for reading into this language a distinction between so-

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[7] Pursuant to Federal Rule of Appellate Procedure 28(j), the United States has brought to our attention *Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607 (5th Cir. 2006). In that case, the Fifth Circuit determined that the imposition of joint and several liability was inappropriate in a contribution claim under § 113. The Court cited *Redwing Carriers* for the proposition that "'when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a),' and the imposition of joint and several liability is inappropriate." *Elementis Chromium*, 450 F.3d at 613. As we have noted, *Redwing Carriers* is an example of the judicial traffic-directing that narrowed the scope of § 107 prior to *Aviall.* Because the Fifth Circuit was not asked to construe § 107 in its opinion, we decline to afford this isolated quotation touching on § 107 the weight the government believes it deserves.

called 'innocent' parties and parties which, if sued, would be held liable under section 107(a)." *Id.* at 99. So saying, the Second Circuit reopened § 107 cost recovery to liable parties.

Our Court now stands at the same crossroad. We agree with our sister Circuit, and hold that it no longer makes sense to view § 113 as a liable party's exclusive remedy. This distinction may have made sense for parties such as Dico, which was allowed to seek contribution under § 113. But here, Atlantic is foreclosed from using § 113. This path is barred because Atlantic—like Aviall—commenced suit before, rather than "during or following," a CERCLA enforcement action. Atlantic has opted to rely upon § 107 to try to recover its cleanup costs exceeding its own equitable share. We conclude it may do so.

The Supreme Court emphasized that §§ 107 and 113 are "distinct." Accordingly, it is no longer appropriate to view § 107's remedies exclusively through a § 113 prism, as we did in *Dico*, and as the government requests. We reject an approach which categorically deprives a liable party of a § 107 remedy. Like the Second Circuit, we return to the text of CERCLA, and find no such limitation in Congress's words.

We have held that "any other person" means any person other than the statutorily enumerated "United States Government or a State or an Indian tribe." *Control Data Corporation*, 53 F.3d at 936 n. 9. Atlantic is such a "person," *see* CERCLA § 101(G)(21); no one disputes its having incurred "necessary costs of response." On its face § 107 applies.

As the Second Circuit stated, "[e]ach of those sections, 107(a) and 113(f)(1), embodies a mechanism for cost recovery available to persons in different procedural circumstances." *Consolidated Edison*, 423 F.3d at 99. Thus, a liable party may, under appropriate procedural circumstances, bring a cost recovery action under § 107. This right is available to parties who have incurred necessary costs of response, but

have neither been sued nor settled their liability under §§ 106 or 107.

We recognize that § 107 allows 100% cost recovery. Some pre-*Aviall* cases justified denying liable parties access to § 107, reasoning Congress would not have intended them to recover 100% of their costs and effectively escape liability. *See, e.g., United Techns.*, 33 F.3d at 100 ("it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures.") We agree, and reaffirm *Dico's* holding that a liable party may not use § 107 to recover its full response cost.

But § 107 is not limited to parties seeking to recover 100% of their costs. To the contrary, the text of § 107(a)(4)(B) permits recovery of "any other necessary costs of response . . . consistent with the national contingency plan." While these words may "suggest full recovery," *United Techns.*, 33 F.3d at 100, they do not compel it.[8] CERCLA, itself, checks overreaching liable parties: If a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f). *Consolidated Edison,* 423 F.3d at 100, n. 9; *Redwing Carriers,* 94 F.3d at 1495. Accordingly, we find that allowing Atlantic's claim for direct recovery under § 107 is entirely consistent with the text and purpose of CERCLA.

Alternatively, we are satisfied that a right to contribution may be fairly implied from the text of § 107(a)(4)(B). Unlike some other statutes, CERCLA reflects Congress's unmistakable intent to create a private right of contribution. *See Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 91, 101 S.Ct. 1571, 1580, 67 L.Ed.2d 750 (1981) ("the ultimate question . . . is whether Congress

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[8] Compare this text to § 107(a)(4)(A)'s more sweeping recovery of "all costs of response . . . not inconsistent with the national contingency plan."

intended to create the private remedy . . . that the plaintiff seeks to invoke"). We discern Congress's intent by looking to CERCLA's language, its legislative history, its underlying purpose and structure, and the likelihood that Congress intended to supersede or to supplement existing state remedies. *Id*.

Contribution is crucial to CERCLA's regulatory scheme. As the Supreme Court recognized in *Key Tronic*, "CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic*, 511 U.S. at 819, n. 13. At first, Congress left some CERCLA liability issues, such as joint-and-several liability and contribution, to be developed by the federal courts under "traditional and evolving principles of common law." *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 806-07 (S.D.Ohio 1983). Courts, thereafter, held § 107 and federal common law supported a right of contribution. *Id.; Mardan Corp.*, 804 F.2d at 1457 n.3. But when Congress revisited CERCLA in 1986, it enacted an explicit right to contribution in § 113. This reflects Congress's unambiguous intent to allow private parties to recover in contribution.

We must next ask whether, in enacting § 113, Congress intended to eliminate the preexisting right to contribution it had allowed for court development under § 107. We conclude it did not. The plain text of § 113 reflects no intent to eliminate other rights to contribution; rather, § 113's saving clause provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action" under §§ 106 or 107. § 113(f)(1). This view is further supported by examining § 113's legislative history reflecting Congress's intention to clarify and confirm, not to supplant or extinguish, the existing right to contribution. *See United Techns.*, 33 F.3d at 100, citing S.Rep. No. 11, 99th Cong., 1st Sess. 44 (1985). We

conclude therefore that if Congress intended § 113 to completely replace § 107 in all circumstances, even where a plaintiff was not eligible to use § 113, it would have done so explicitly. Accordingly, we consider the plain language of CERCLA to be consistent with an implied right to contribution for parties such as Atlantic.

We conclude that the broad language of § 107 supports not only a right of cost recovery but also an implied right to contribution.[9] *See Pinal Creek*, 118 F.3d at 1302 ("§ 107 implicitly incorporates a claim for contribution"); *United Techns.*, 33 F.3d at 99 n. 8 ("It is possible that, although falling outside the statutory parameters for an express cause of action for contribution [under § 113(f)(1)], a [volunteer remediator] who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under § 107(c)"). We discern nothing in CERCLA's words, suggesting Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting—indeed, penalizing—those who voluntarily assume such duties.

The government argues that if we allow Atlantic a § 107 remedy, we will render § 113 meaningless. Appellee's Br. at 24-25. This argument fails; liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality. But parties such as Atlantic, which have not faced a CERCLA action, and are thereby barred from § 113, retain their access to § 107. *See Key Tronic*, 511 U.S. at 818; *United Techns.*, 33 F.3d at 99 n. 8; *Pinal Creek*, 118 F.3d at 1301. This resolution gives life to each of CERCLA's sections, and is

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[9] As we have found a statutory right to direct recovery and contribution, we need not address Atlantic's claim of a similar right under federal common law. Accordingly, we leave that question for another day.

consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites. *Key Tronic*, 511 U.S. at 819, n. 13.

A contrary ruling, barring Atlantic from recovering a portion of its costs, is not only contrary to CERCLA's purpose, but results in an absurd and unjust outcome. Consider: in this, of all cases, the United States is a liable party (who else has rocket motors to clean?). It is, simultaneously, CERCLA's primary enforcer at this, among other Superfund sites. *See* Sophia Strong, Note, *Aviall Services v. Cooper Industries: Implications for the United States' Liability Under CERCLA, the "Superfund Law"*, 56 Hastings L.J. 193, 198-99 (2004).

If we adopted the Government's reading of § 107, the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle. This bizarre outcome would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination.

Congress understood the United States' dual role. When it enacted SARA, it explicitly waived sovereign immunity. CERCLA § 120(a). This waiver is part and parcel of CERCLA's regulatory scheme. It shows Congress had no intention of making private parties shoulder the government's share of liability. Strong, 56 Hastings L.J. at 209-10.

Here, Atlantic assisted the United States by helping modernize its defenses. Atlantic, recognizing the deleterious environmental consequences, remediated the environment without compulsion. Its choice to do so, especially where the ultimate compulsory authority lay with the United States-corporate, will not be held to its detriment. The United States, under CERCLA, is liable for its share of the burden.

The Court, then, concludes Congress resolved the question of the United States' liability 20 years ago. It did not create a loophole by which the Republic could escape its own CERCLA liability by perversely abandoning its CERCLA enforcement power. Congress put the public's right to a clean and safe environment ahead of the sovereign's traditional immunities.

We hold that a private party which voluntarily undertakes a cleanup for which it may be held liable, thus barring it from contribution under CERCLA's § 113, may pursue an action for direct recovery or contribution under § 107, against another liable party.

We reverse the judgment of the district court.

It is so ordered.

(7)

No. 05-1323

IN THE

Supreme Court of the United States

UGI UTILITIES, INC.,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

CARTER G. PHILLIPS
ANGUS MACBETH
STEPHEN B. KINNAIRD
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

WOODY N. PETERSON*
DAVID L. ELKIND
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
(202) 420-2200

RICHARD W. BABINECZ
ASSOCIATE GENERAL COUNSEL
AND GENERAL ATTORNEY
MICHAEL A. WILCKEN
ASSISTANT GENERAL COUNSEL
CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.
4 Irving Place
New York, NY 10003-3502
(212) 460-2477

Attorneys for Respondent

* Counsel of Record

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RULE 29.6 STATEMENT

The Rule 29.6 statement in the brief in opposition is current.

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SUPPLEMENTAL BRIEF OF RESPONDENT

Responding to an invitation from this Court, the Government has filed a brief recommending that this Court hold the petition filed by UGI Utilities Inc. in this case pending disposition of the petitions in *E.I. du Pont de Nemours & Co. v. United States*, No. 06-726 (cert. filed Nov. 21, 2006) (*DuPont*) and *United States v. Atlantic Research Corp.*, No. 06-562 (cert. filed Oct. 24, 2006), both of which the Government urges this Court to grant. Br. of the United States As *Amicus Curiae* ("U.S. Br.") 2. Notwithstanding its original filing of an opposition to the petition, respondent Consolidated Edison Company of New York, Inc. ("Con Ed") respectfully disagrees with the Government's recommendation. If the Court is inclined to grant certiorari on the question of the availability of private rights of action under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), it would be better served to grant the *DuPont* and *UGI* petitions rather than granting two petitions that both involve actions against the United States. By doing so, the Court may then decide the question of the availability of section 107(a) actions both against the United States and against private parties.

In this case, the Second Circuit addressed an issue left open in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), and held that "section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding but that, if sued, would be held liable under section 107(a) to recover necessary response costs incurred voluntarily." Pet. App. 16a-17a. UGI filed a petition for certiorari seeking review of this decision. Con Ed opposed the petition on the grounds that, at the time, "only one court of appeals – the Second Circuit – has had an opportunity to consider the many questions left open in *Aviall*, and even that court addressed but one of them." Opp. 5. Con Ed recommended instead that this Court forbear granting certiorari to allow the many questions identified in *Aviall* "to be given

'full consideration' (*Aviall*, 543 U.S. at 169) by the various courts of appeals which now or soon will have the issues before them." Opp. 5.

Circumstances have changed since Con Ed filed its opposition on June 2, 2006. Two other courts of appeals have now decided the question of the availability of a section 107(a) action to potentially responsible parties (PRPs) who cannot seek contribution under section 113(f), and have created a direct and acknowledged 2-1 circuit conflict. Relying on the Second Circuit's decision below, the Eighth Circuit stated that "[w]e agree with our sister Circuit, and hold that it no longer makes sense to view § 113 as a liable party's exclusive remedy." *Atlantic Research Corp. v. United States*, 459 F.3d 827, 834 (8th Cir. 2006). Accordingly, the Eighth Circuit followed the Second Circuit's lead and held that an action under section 107(a) is available to "parties who have incurred necessary costs of response, but have neither been sued nor settled their liability under §§ 106 or 107." *Id.* at 835.

The Third Circuit by contrast expressly rejected the Second Circuit's analysis, and refused "to imply a cause of action for contribution under § 107 or the common law available to PRPs engaged in *sua sponte* voluntary cleanups." *E.I. du Pont de Nemours & Co. v. United States*, 460 F.3d 515, 543 (3d Cir. 2006). It further "note[d] that *Atlantic Research* relies almost entirely on the reasoning of *Consolidated Edison*, and thus our consideration of the Second Circuit's case applies as well to the decision of the Eighth Circuit." *Id.* at 529 n.18. In light of the circuit conflict that emerged, the United States and DuPont have petitioned for writs of certiorari to the Eighth and Third Circuits respectively.

This Court may still wish to defer review until a case arises addressing all the issues flagged in *Aviall*. *See* Opp. 3. But if this Court decides to resolve the circuit conflict now, the better course is not to grant the *DuPont* and *Atlantic Research* petitions, as the Government proposes. While the Government may prefer to be a petitioner in *Atlantic Research* with

the right to file both an initial and reply brief, there would be little point from this Court's perspective in granting consolidated review of two cases involving section 107(a) actions against the United States that pose essentially identical issues.

This Court would be better served to grant the *DuPont* and *UGI* petitions, and take the opportunity to resolve the question of the availability of private rights of action under section 107(a) in the most important contexts where it arises: a suit against the United States as a PRP (presented in *DuPont*), and against nonfederal private PRPs (presented in *UGI*).

Consideration of both the *DuPont* and *UGI* petitions would benefit this Court's review. First, although CERCLA contains a broad waiver of sovereign immunity providing that federal departments, agencies, and instrumentalities "shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title," 42 U.S.C. § 9620(a), this Court may wish to consider whether it has the same latitude to find implied rights of action against the Federal Government as it does against nongovernmental actors. *Key Tronic Corp. v. United States*, 511 U.S. 809, 817-18 & n.11 (1994) (stating that section 107(a) specifies that enumerated parties "'shall be liable,'" but the question who may enforce that liability is a matter of judicial implication).

Second, the availability and scope of any implied right of action under section 107(a) cannot be resolved without an understanding of the scope of the express right of action granted to PRPs under section 113, 42 U.S.C. § 9613. The Court addressed the scope of section 113(f)(1) in *Aviall*, but has not yet addressed section 113(f)(3)(B). That section provides that:

> [a] person who has resolved its liability to the United States or a State *for some or all of a response action* or for some or all of the costs of such action in an adminis-

> trative or judicially approved settlement may seek contribution from any person who is not party to a settlement [that provides contribution protection].

Id. § 9613(f)(3)(B) (emphasis added). Among the three courts of appeals whose decisions this Court is urged to review, the Second Circuit alone has decided the availability of section 113(f)(3)(B) and section 107(a) remedies to a settling PRP plaintiff. Here, Con Ed executed an administrative settlement agreement with the New York State Department of Environmental Conservation ("NYSDEC") to clean up the sites in question. The Second Circuit construed the agreement to provide (1) as to recovery of the NYSDEC's own response costs, a release only as to claims under state law, and (2) as to enforcement actions, a covenant not to sue under CERCLA only during the implementation of the agreement, and even then with exceptions for actions responding to significant threats from the existing contamination and for summary abatement. Pet. App. 9a-10a. Because there was no categorical covenant or release, and NYSDEC "might still seek to hold Con Ed liable under CERCLA," the Second Circuit ruled that "Con Ed [had not] resolved its liability to the Department under CERCLA" and therefore cannot sue another PRP under section 113(f)(3)(B). *Id.* at 10a.

The Government expresses doubt about the Second Circuit's section 113(f)(3)(B) ruling. U.S. Br. 12. Nonetheless, because Con Ed's entitlement to bring an action under section 113(f)(3)(B) might provide an alternative ground in support of the judgment, or may present an issue the determination of which this Court deems necessary to an intelligent resolution of the question presented regarding section 107(a) remedies, *Ohio v. Robinette*, 519 U.S. 33, 38 (1996), the Government advises this Court to hold rather than grant the *UGI* petition. U.S. Br. 10-11. While the Government is right to question the Second Circuit's section 113(f)(3)(B) ruling, it is mistaken to counsel against granting *UGI* on this basis.

The scope of the express section 113(f)(3)(B) right of action is unquestionably a predicate to an intelligent resolution not just of Con Ed's entitlement to a section 107(a) remedy, but also of any determination of what right of action is available under the latter section. Indeed, to the extent this Court invokes its implied-right-of-action jurisprudence in construing section 107(a), the scope of express remedies is a necessary element of the analysis. *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19-20 (1979). Moreover, this Court's deliberation over whether Congress intended a section 107(a) private right of action for PRPs would be aided by knowing whether such a remedy would be strictly limited to independent volunteers (*i.e.*, PRPs who perform clean-up without settlement agreements with federal or state environmental regulators), or also would be the *only* cost-recovery remedy available to the many PRPs who have voluntarily entered into settlements with federal or state authorities that provide something less than a categorical release of future CERCLA liability.[1]

This Court should recognize that the Second Circuit's crabbed construction of section 113(f)(3)(B) – which depends on the scope of covenants not to sue – would apparently foreclose that express remedy even to many PRPs who have entered into *federal* CERCLA settlements. The inclusion of covenants not to sue in federal agreements, and their scope, are "[d]iscretionary" with the President, and depend upon a public-interest analysis. 42 U.S.C. § 9622(f)(1), (4) (setting

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[1] Besides the substantial number of (typically large) remediations conducted under federal auspices, U.S.E.P.A., *Superfund National Accomplishments Summary Fiscal Year 2006* (last updated Dec. 11, 2006), *available at* http://www.epa.gov/superfund/action/process/numbers06.htm, state judicial and administrative settlements may number in the thousands. In New York alone, there have been more than 250 remediation actions conducted under its State Superfund, Brownfields, and Voluntary Clean-Up Programs. NYSDEC, *Annual Remedial Programs Report For State Fiscal Year 2005-06* at 3 tbl.2, 5 tbl.3, 7 tbl.5 (2006), *available at* http://www.dec.state.ny.us/website/der/2006annualreport.pdf.

out public-interest factors for the President to consider in "assessing the appropriateness of a covenant not to sue under paragraph (1) and any condition to be included"); *see also id.* § 9622(c)(1) ("the President shall be guided by the principle that a more complete covenant not to sue shall be provided for a more permanent remedy undertaken by such parties").

Equally problematic for PRPs who settle with the federal government is the Second Circuit's holding that no section 113(f)(3)(B) remedy is available if the agreement reserves the right to sue under CERCLA after implementation of the agreement or to redress significant threats from the existing contamination. Pet. App. 9a-10a. Such reservations exist in federal settlements. Even apart from any conditions and exceptions the President may impose in a covenant not to sue, by statute no covenant takes effect "until the President certifies that remedial action has been completed in accordance" with CERCLA requirements, and such covenants are always "subject to the satisfactory performance by such party of its obligations under the agreement concerned." 42 U.S.C. § 9622(f)(3), (5).

Finally, except in extraordinary circumstances specified by statute, the President may not covenant "concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time" of presidential certification. *Id.* § 9622(f)(6)(A).

In short, neither federal nor state agreements are likely to provide the kind of categorical covenants not to sue under CERCLA that the Second Circuit envisions[2]; the many un-

[2] In New York, "[s]ome of the earlier agreements contained complete releases," but "the trend now is for the releases to have reopeners which limit the scope of the release," excepting such circumstances as unknown site conditions, new information received by NYSDEC, implementation failures, new contamination, new site uses, and contaminant migration. New York State Bar Ass'n, *Redevelopment of Contaminated Properties in*

knowns associated with hazardous wastes and the need to reserve the power of governments to redress future public health and safety risks militate against them.

This Court need not resolve any issues of construction of section 113(f)(3)(B) other than the question of its basic scope, which the Second Circuit decided wrongly. The Second Circuit's construction is inconsistent with the plain statutory language providing a contribution remedy to any "person who has resolved its liability to the United States or a State for some or all of a response action." *Id.* § 9613(f)(3)(B). The natural interpretation of that language is that if a person performs an agreement with a State to "respond" by hazardous-waste "removal" or "remedial action" under CERCLA, *id.* § 9601(23)-(25), for which it would potentially be liable in an enforcement action brought by a State, the person may seek contribution for the costs of response from another responsible party. *Cf. id.* § 9628(a)(2) & (b) (addressing state response programs under state law and relative federal and state enforcement roles). Accordingly, it does not matter whether the State in the agreement has covenanted not to sue the PRP under CERCLA to perform additional clean-up at the site; so long as the clean-up performed by the person under the agreement "resolved its liability to the United States or a State *for some* or all of a response action," *id.* § 9613(f)(3)(B) (emphasis added), that person may seek contribution from other responsible parties under section 113(f)(3)(B).

There is no question, especially construing the facts in favor of Con Ed at the summary judgment stage, that the millions of dollars that Con Ed has expended and is expending removing and remediating hazardous waste under the NYSDEC agreement resolved some of the liability it would have had if the State had brought an enforcement action. As the Second Circuit acknowledged, under CERCLA "Con Ed has incurred and is incurring 'costs of response,' in that it is in-

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New York – The Impediments and the Solutions: A Guide to the Practitioner 39 (1996).

curring costs of 'removal' and 'remedial action.'" Pet. App. 15a. Thus, even if this Court were to accept the Second Circuit's unduly narrow reading of the NYSDEC settlement agreement,[3] it should reject the Second Circuit's untenable construction of section 113(f)(3)(B) and rule in favor of respondent.

Not only is the scope of section 113(f)(3)(B) critical to any determination of available rights of action under section 107(a), but also there is no prudential reason to avoid this threshold issue. The typical concern with alternative grounds or threshold legal issues is that they might preclude consideration of the question presented that this Court deemed pressing enough to warrant certiorari. While that concern may be present if only a single case is under consideration, it is not relevant here because Con Ed proposes that this petition be granted in tandem with the *DuPont* petition. No party disputes that *DuPont* should be granted, and the *DuPont* petition cleanly presents the question whether section 107(a) provides a right of action for a PRP who has no remedy under section 113. Thus, giving plenary consideration to the section 113(f)(3)(B) issue in *UGI* can in no circumstance deprive the Court of the opportunity to resolve the section 107(a) issue; it can only enhance the Court's consideration of that question, for the reasons already given. There is no sense in waiting for a circuit conflict to emerge on section 113(f)(3)(B) when its

[3] For example, besides NYSDEC's promise not to bring a CERCLA action except as provided, Pet. App. 10a, the agreement specifically recites that "to the extent authorized under 42 U.S.C. Section 9613 and any other applicable law, [Con Ed] shall not be liable for any claim, now or in the future, in the nature of contribution by potentially responsible parties concerning the alleged contamination which is addressed under this agreement." C.A. App. 888. NYSDEC could only make that representation if in performing the agreement Con Ed "resolved its liability to ... a State in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(2). Thus, UGI is wrong in stating that the clean-up agreement makes no mention of resolution of liability for CERCLA response actions (UGI Br. In Response To Brief For The United States As Amicus Curiae 5 n.3).

interpretation is a predicate to comprehensive, intelligent resolution of the section 107(a) issue, and when uncertainty as to whether settling PRPs have *any* contribution remedy under section 113(f)(3)(B) absent a categorical covenant not to sue from the federal or state agency may deter CERCLA settlements in the future.

The Government's second objection to granting the *UGI* petition appears to be based on a misreading of the Second Circuit's decision. The Government states that:

> [t]his case may also constitute a less suitable vehicle than *Atlantic Research* or *DuPont* on the ground that, unlike those cases, it does not present the subsidiary question of whether one PRP could bring an action against another on the theory that Section 107(a) contains an implied right to contribution.

U.S. Br. at 13. The Government concludes that the Second Circuit held that "Section 107(a) *expressly* authorized one PRP to sue another," relying on the court's statement that Con Ed's right to "'sue under section 107(a) is easily resolved based on that section's plain language.'" *Id.* (quoting Pet. App. 14a). But the Second Circuit did not (and could not) quarrel with this Court's holding that, in contrast to the express remedy in section 113, CERCLA "impliedly authorizes a similar and somewhat overlapping remedy in § 107." *Key Tronic*, 511 U.S., at 816; *id.* at 818 ("although § 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs, that cause of action is not explicitly set out in the text of the statute," which "only impliedly authorizes suit"); *see also Aviall*, 543 U.S. at 174 (Ginsburg, J., dissenting) (noting that the *Key Tronic* Court recognized a "§ 107 implied right").[4] Rather, the Second Circuit held that because Con Ed is a "'person'" incurring "'response costs,'"

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[4] This Court has left open the question whether the implied right of action in section 107 is one for cost-recovery or contribution or both. *Aviall*, 543 U.S. at 170-71.

it is a party to whom the responsible persons named in section 107 are liable as a matter of plain statutory text, and thus a right of action must be recognized in its favor. The Second Circuit simply would not read into the statutory language on liability a limitation to persons "innocent of wrongdoing." Pet. App. 14a-15a. The Government's second objection is thus based on a mistaken premise. In any event, the objection is immaterial if the Court were to grant both *DuPont* and *UGI*. The Government concedes that *DuPont* presents the question of an implied right of action under section 107(a), U.S. Br. 13, so granting *UGI* as well would not affect the Court's consideration of that aspect of the issue.

In summary, even if this Court were not inclined to address the section 113(f)(3)(B) issue, it still should grant certiorari in both *DuPont* and *UGI* so that it may resolve the section 107(a) issue in the context of both actions against a federal PRP and actions against a nonfederal private PRP. But, as a matter of prudent discretion, the Court should reach the section 113(f)(3)(B) issue based on full briefing by parties with a direct stake in the outcome of that issue because it is a predicate to the intelligent resolution of the important section 107(a) issues presented by the various petitions.

CONCLUSION

If the Court resolves to decide the section 107(a) question, it should grant both the *DuPont* and *UGI* petitions and set them for argument.

Respectfully submitted,

CARTER G. PHILLIPS
ANGUS MACBETH
STEPHEN B. KINNAIRD
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

WOODY N. PETERSON*
DAVID L. ELKIND
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
(202) 420-2200

RICHARD W. BABINECZ
ASSOCIATE GENERAL COUNSEL
AND GENERAL ATTORNEY
MICHAEL A. WILCKEN
ASSISTANT GENERAL COUNSEL
CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.
4 Irving Place
New York, NY 10003-3502
(212) 460-2477

Attorneys for Respondent

* Counsel of Record

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No. 05-1323

IN THE

Supreme Court of the United States

UGI UTILITIES, INC.,
Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON *
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR PETITIONER

The Second Circuit has decided a question that this Court expressly left unresolved in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004): whether a party potentially responsible for environmental cleanup costs can recover those costs from other potentially responsible parties (PRPs) under § 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a)(4)(B). Remarkably, respondent concedes that this issue is important (Br. in Opp'n 4) and eschews offering a defense of the Second Circuit's erroneous treatment of it (*id.* at 8). This Court should now definitively resolve the issue because (i) the Second Circuit's decision conflicts with the holdings of ten other circuits (Pet. 10-12; *infra*, 4); (ii) it is inconsistent with CERCLA's text, structure, and legislative history (Pet. 12-17); and (iii) it involves a matter of recurring importance to the proper administration of CERCLA (*id.* at 14-16, 24).

1. As the United States has again advocated, the Second Circuit's decision cannot be reconciled with the decisions of other courts of appeals, and it misinterprets CERCLA in a way that interferes with the statute's cleanup scheme. Since the filing of the petition, the United States has submitted to the Seventh Circuit an amicus brief on behalf of both the Environmental Protection Agency and the Department of Justice addressing the § 107 issue presented here. As the Government there explains, because Congress tasked the President (and his delegate, the EPA) with administering CERCLA's "Superfund" program for environmental cleanup, "the United States has a substantial interest in assuring that CERCLA is interpreted in a way that promotes efficient and effective cleanup of hazardous waste sites." Brief of United States as Amicus Curiae at 1, *Metro. Water Reclamation Dist.* v. *N. Am. Galvanizing & Coatings, Inc.*, No. 05-3299, 2006 WL 1354188, at *1 (7th Cir. May 2, 2006) [hereinafter

U.S. *Metro.* Br.], also available at www.ca7.uscourts.gov/briefs.[1] This "substantial interest" in cleanup drives the Government's interpretation of CERCLA and demonstrates the fallacy in respondent's suggestion (Br. in Opp'n 8 n.9) that the Government's views should be ignored as "part of a broader litigation strategy designed to avoid paying cleanup costs altogether" (*id.*). To the contrary, the EPA's interpretation of CERCLA should be afforded deference. *Cf. Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U. S. 837 (1984).

In its amicus brief, the Government reaffirms its position that the Second Circuit's decision here is "wrong because it frustrates the comprehensive scheme Congress created in section 113(f)[, 42 U.S.C. § 9613(f)]." U.S. *Metro.* Br. at 18, 2006 WL 1354188, *18. As the United States explains, Congress purposely designed § 113(f)'s contribution remedy "to encourage quick and effective resolution of environmental disputes . . .[,] avoid the threat of disproportionate liability, . . . [and] provide[] for prompt replenishment of the Superfund." *Id.* at 18-19, 2006 WL 1354188, at *18-19 (citations and internal quotations omitted). Before a PRP can sue under § 113(f), it must either resolve its CERCLA liability with a federal or state enforcement agency or have already been sued by such an agency. 42 U.S.C. §§ 9613(f)(1) & 9613(f)(3)(B). And PRPs that resolve their liability to the United States or a state are not liable for contribution under § 113. 42 U.S.C. § 9613(f)(2). As the Government's amicus brief states, by allowing PRPs that clean up "voluntarily,"

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[1] In soliciting the views of the EPA, the Seventh Circuit emphasized the importance of the issue presented here: "Because resolution of [the § 107] issue could have a significant impact on the administration of the Nation's environmental policies, as set forth in federal statutory law, the court invites the Environmental Protection Agency to submit a brief as amicus curiae on the appropriate interpretation of section 107." Order, *Metro. Water Reclamation Dist.* v. *N. Am. Galvanizing & Coatings, Inc.*, No. 05-3299 (7th Cir. Jan. 23, 2006) (inviting EPA to submit amicus brief).

i.e., without having been sued by, or settled with, the United States or a state, to sue other PRPs under § 107(a), the Second Circuit's decision "significantly undercuts the incentive for responsible parties to settle with the government provided by the contribution protection provision of section 113(f)(2)." U.S. *Metro.* Br. at 20, 2006 WL 1354188, at *20.

The United States' amicus brief also refutes respondent's suggestion that there is "no 'split' in the circuits" (Br. in Opp'n 7) on whether PRPs can recover under § 107(a). As the Government counsels, no other circuit is in accord with the Second Circuit: "Under binding Seventh Circuit authority, claims brought by PRPs sound in contribution and must be brought pursuant to section 113 of CERCLA. A total of nine[2] courts of appeals have reached the same conclusion." U.S. *Metro.* Br. at 5, 2006 WL 1354188, at *5 (citations omitted). And, unlike respondent's attempt to downplay the Second Circuit's admitted conflict with the Ninth Circuit, the Government's brief emphasizes it: "the Second Circuit acknowledged that its interpretation of sections 107 and 113 conflicts with the Ninth Circuit's holding in *Pinal Creek* [*Group* v. *Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997)] and with the First Circuit's decision in *United Techs.* [*Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96 (1st Cir. 1994)]." U.S. *Metro.* Br. at 14, 2006 WL 1354188, at *14. Highlighting further the conflict with the First Circuit, the Government explains that the Second Circuit's attempt to limit its § 107(a) claim to PRPs that have "voluntarily incurred response costs . . . is inconsistent with the statute" and was rejected by the First Circuit "as a 'sleight of hand.'" *Id.* at 16, 2006 WL 1354188, at *16 (quoting *United Techs.*, 33 F.3d at 102).

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[2] Now ten, *see infra*, 4.

2. Although the Second Circuit issued the decision after *Cooper Industries*, that fact does not avoid the circuit conflict it acknowledges or minimize the importance of the § 107 issue. Respondent contends that there is no circuit split because only the Second Circuit has ruled on the § 107 issue post-*Cooper Industries*. Br. in Opp'n 7. In *Cooper Industries*, however, the Court declined to reach the § 107 issue, and left in place, pending further examination, the courts of appeals' decisions holding that PRPs cannot sue under § 107(a). 543 U.S. at 169. The Second Circuit's decision conflicts with those courts' decisions holding that a PRP can only recover its cleanup costs through a § 113(f) contribution claim.

Respondent does not take issue with the merits of these conflicting holdings. Instead, it quotes the *Cooper Industries* dissent to "refute petitioner's contention that the Second Circuit's ruling . . . departs . . . from the statutory text." Br. in Opp'n 9. Respondent's reliance on that dissent is remarkable for two reasons. First, even while relying on it, respondent fails to acknowledge that the dissent urged that the § 107 issue was sufficiently important for the Court to resolve last Term, even though the courts below had not ruled on the issue and the parties had not briefed it. Second, respondent champions the dissent's interpretation of CERCLA's text while ignoring the mistaken modification of that text in the quote, which, as the petition explains, materially alters the statutory meaning (*see* Pet. 25-26).

3. The Fifth Circuit now also has ruled that, contrary to the decision below, PRPs have no § 107(a) cost recovery claim, but PRPs continue to litigate that issue across the Nation. The Fifth Circuit, in a recent ruling that PRPs are not subject to joint and several liability for contribution, held, "[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under §107(a)." *Elementis Chromium L.P.* v. *Coastal States Petroleum Co.*, No. 04-20519, 2006 WL 1453054, at *4 (5th Cir.

May 26, 2006). In so holding, the Fifth Circuit expressly followed the Eleventh Circuit's decision in *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1513 (11th Cir. 1996), one of the decisions in the nine other circuits that had previously interpreted CERCLA not to allow PRPs to sue under § 107(a). *See* Pet. 10-11. Thus, the Fifth Circuit has now joined those circuits whose decisions conflict with the Second Circuit's decision in this case.

The Fifth Circuit's ruling, which neither mentions *Cooper Industries* nor confronts the Second Circuit's novel "voluntary PRP" construct, is unlikely to decrease the rate at which PRPs across the Nation are seeking recovery under § 107(a) as a result of *Cooper Industries*' reading of the statutory limitations on § 113(f) contribution claims. PRPs precluded from recovering under § 113(f) have increasingly looked to § 107(a) as a means of recovering their cleanup costs from other PRPs. In affording some PRPs such a remedy, the Second Circuit has emboldened those efforts. One need only review the KeyCite report for the Second Circuit's decision to see that over thirty-five briefs in nineteen cases have already invoked the decision in the nine months since it issued. Many of those briefs seek a § 107(a) remedy despite contrary controlling decisions issued pre-*Cooper Industries*. As both petitioner and respondent have noted, some lower courts appear eager to find a § 113(f) workaround, including, most recently, the District of Kansas. *See Raytheon Aircraft Co.* v. *United States*, No. 05-2328-JWL, 2006 WL 1517762, at *9 n.9 (D. Kan. May 26, 2006) (mentioning Second Circuit decision as "significant" and concluding that a PRP that does not qualify for a § 113(f) contribution claim has instead an implied right of contribution under § 107).[3]

Respondent acknowledges that the issue presented here is currently at stake in cases pending on the dockets of at least four courts of appeals and numerous district courts. Br. in

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[3] *See also* Pet. 26-28 & nn.14-15 (collecting other cases).

Opp'n 6 & nn.5-6; *see also* Pet. 26-28 & nn.13-15. Thus, even were respondent correct in characterizing the Second Circuit's decision as an index case, one having no relationship to the previous appellate decisions with which its § 107 holding conflicts, the paramount federal interests involved weigh heavily against leaving the issue to be adjudicated seriatim by the lower courts.

4. Whether PRPs can recover under § 107(a) was decided below and is properly presented by the petition. Contrary to respondent's effort to portray the Second Circuit's decision as insubstantial or incomplete (*see* Br. in Opp'n 3-4), that decision resolved the paramount statutory interpretation questions left open in *Cooper Industries*. The court ruled, *first*, that some PRPs can recover their cleanup costs under § 107(a) (Pet. App. 16a-17a); *second*, that § 107(a) affords those PRPs an express cause of action (*id.* at 14a-15a); *third*, that the cause of action entitles those PRPs to recover their cleanup costs jointly and severally from other PRPs (*id.* at 15a & n.9); and, *fourth*, that the cause of action survives unaffected by Congress's amending CERCLA to add § 113(f)'s contribution claim (*id.* at 12a-15a, 21a).

Respondent's suggestion that the Second Circuit "did not confront the relationship between §§ 107 and 113" (Br. in Opp'n (i) (internal quotations omitted)) is confused. While the Second Circuit erred in its conclusions about that relationship, there is little else it considered. *See, e.g.*, Pet. App. 12a-13a (addressing "the relationship between section 107(a) and section 113(f)(1)" in distinguishing its holding in *Bedford Affiliates* v. *Sills*, 156 F.3d 416 (2d Cir. 1998), that PRPs are limited to contribution claims under § 113(f)); Pet. App. 15a n.9 (considering the possibility that a PRP claim under § 107(a) would be subject to a § 113(f) counterclaim); *id.* at 17a n.12 (considering relationship between its new § 107(a) claim and § 113(f)(1)'s statute of limitations). The Second Circuit's consideration of the relationship between § 107(a) and § 113(f) (or the perceived lack thereof) lies at the heart of

its analysis: it ruled that "section 107(a) is distinct and independent from section 113(f)(1)" (Pet. App. 14a) such that "whether a party in Con Ed's circumstances may sue under section 107(a) is easily resolved based on that section's plain language" (*id.*).

As the petition explains, however, the Second Circuit misread § 107(a)(4)(B)'s "any other person" language to include PRPs. Pet. 12. As the United States recently stated, "[t]he more logical reading is that 'any other person' [ ] excludes the four categories of PRPs listed in the first four paragraphs of section 107(a)." U.S. *Metro.* Br. at 10-11, 2006 WL 1354188, at *10-11. In misreading § 107(a) to afford PRPs a right of recovery unconstrained by § 113's contribution provisions, the Second Circuit's decision, as the Government explains, will "eliminate the finality Congress intended section 113(f)(2) to bring to the CERCLA settlement process and thereby reduce the incentive to settle." *Id.* at 20, 2006 WL 1354188, at *20.

5. The court of appeals' *sua sponte* decision that § 107(a) affords PRPs a cost recovery claim warrants review. Respondent's contention that review should be denied because "no issue reserved in *Aviall* was raised below" (Br. in Opp'n 3 (capitalization omitted)) is misplaced. The Court has frequently reviewed *sua sponte* decisions of the courts of appeals that, like the one below, raise important issues of federal law. *See, e.g., Dir., Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 125 (1995); *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 733-34 (1985); *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 610 (1978).

Also incorrect is respondent's suggestion that this case presents the § 107 issue in "much the same posture" (Br. in Opp'n 3) as did *Cooper Industries*. In *Cooper Industries*, the Court did not reach the § 107 issue because (i) no court below had decided the issue or addressed whether Aviall, the PRP, had waived it, 543 U.S. at 168-69, and (ii) the issue was

"well beyond the scope of the briefing and . . . the question presented," *id.* at 169. Here, those concerns are absent. There is no question that the Second Circuit reached and decided the issue and ruled further that respondent did not waive it. Pet. App. 21a-22a.[4] The issue is unquestionably presented in the petition and will be briefed fully should the Court grant review.[5]

Given the importance of the issue and the burdensome litigation it has and will spawn across the Nation, respondent's preferred approach of "allow[ing] *Aviall* itself to proceed in the normal remand course through the district court and the court of appeals" (Br. in Opp'n 5) is ill considered. *See Laing* v. *United States*, 423 U.S. 161, 167 (1976) (granting certiorari in part because numerous pending cases depended on resolution of conflict); *see also* ROBERT L. STERN ET AL.,

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[4] The Second Circuit's holding that the § 107 issue is jurisdictional and thus not subject to waiver (Pet. App. 22a) further empowers "voluntary" PRPs to argue that § 113(f) contribution claims that are defective under *Cooper Industries* should be transformed into § 107(a) cost recovery claims, regardless of how long those claims had been pleaded and litigated under § 113(f).

[5] Although respondent mentions that "the court of appeals remanded the case" (Br. in Opp'n 2), it appropriately makes no argument that the remand militates against review. *Cooper Industries* granted review and decided the § 113 issue in a similar posture, with the Court granting certiorari after the Fifth Circuit reinstated a § 113 claim. *See* 543 U.S. at 164-65. Indeed, the Court has repeatedly granted certiorari to review decisions of the courts of appeals that, like the decision below, would be final but for that court's erroneous construction of federal law. *See, e.g.*, *Cent. Bank* v. *First Interstate Bank*, 511 U.S. 164 (1994) (reviewing reversal of summary judgment and resolving issue, which Court had previously left undecided, of whether § 10(b) of the Securities Exchange Act of 1934 created a cause of action for aiding and abetting a violation of that section). *See also Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) ("The judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'" (quoting *Land* v. *Dollar*, 330 U.S. 731, 734 (1947)).

SUPREME COURT PRACTICE § 4.13, at 248 (8th ed. 2002) ("Importance may further be shown by demonstrating that the issue is novel or troublesome and is involved in numerous cases pending in lower courts, thereby making desirable an early and definitive ruling by the Supreme Court."). Even were there some benefit in awaiting the return of *Cooper Industries*, and respondent offers none, there can be no assurance that the parties in that case (or in any other) will persevere to seek certiorari on the § 107 issue. As it has in the past, the Court should grant certiorari in this subsequent case to consider the issue it earlier specifically reserved. *See, e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 379-80 & n.6 (1983) (certiorari granted to consider issue reserved in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 752 n.15 (1975)); *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 401, 402 (1981) (certiorari granted to consider "important question of federal labor law" reserved in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 249 n.7 (1962)); *Warden, Lewisburg Penitentiary* v. *Marrero*, 417 U.S. 653, 656 (1974) (deciding question reserved in *Bradley* v. *United States*, 410 U.S. 605, 611 n.6 (1973)).

The importance of the CERCLA issue presented is evidenced both by the number of times the Second Circuit's decision has already been invoked by courts and litigants and by the fact that the United States has twice informed other courts of appeals that the decision is wrong. U.S. *Metro.* Br. at 18, 2006 WL 1354188, at *18; Br. of the Appellee at 47-50, *Atl. Research Corp.* v. *United States*, No. 05-3152 (8th Cir. Dec. 6, 2005) [hereinafter U.S. *Atl. Research* Br.], Pet. App. 167a-170a. Like petitioner, the United States has argued that in creating its § 107(a) "voluntary" PRP claim, the Second Circuit misconstrued CERCLA's text, structure, and history. U.S. *Metro.* Br. at 6-20, 2006 WL 1354188, at *6-20; U.S. *Atl. Research* Br. at 47-50, Pet. App. 167a-170a.

Although respondent suggests postponing resolution of the § 107 issue, delay in resolving it will make more difficult the

Government's administration of environmental cleanups, in addition to imposing substantial costs on the judicial system and its participants who will be forced to endure the issue's repeated visitation. Countervailing considerations to granting review are wholly lacking: The issue presented is an important matter of CERCLA construction that has been addressed by eleven courts of appeals. It is an issue that two Justices would have decided last Term even without the benefit of full briefing or a lower court decision, both of which this case presents. It is an issue that should now be resolved.

* * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON*
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

*Counsel of Record

Attorneys for Petitioner

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No. 05-1323

In the Supreme Court of the United States

UGI UTILITIES, INC., PETITIONER

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
KANNON K. SHANMUGAM
Assistant to the Solicitor General
RONALD M. SPRITZER
ELLEN J. DURKEE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. 9607(a).

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In the Supreme Court of the United States

No. 05-1323

UGI UTILITIES, INC., PETITIONER

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Like the government's petition for a writ of certiorari in *United States* v. *Atlantic Research Corp.*, No. 06-562 (filed Oct. 24, 2006), and the petition in *E.I. du Pont de Nemours & Co.* v. *United States*, No. 06-726 (filed Nov. 21, 2006) (*DuPont*), the petition in this case presents the principal question left open by the Court two Terms ago in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004): Whether a party that is potentially responsible for the cleanup of property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, but is not eligible to

bring an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may nevertheless bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. 9607(a). In this case, the court of appeals erroneously held that a potentially responsible party could bring such an action under Section 107(a). Because this case would constitute a less suitable vehicle than *Atlantic Research* or *DuPont* for resolution of that question, however, the petition for a writ of certiorari should be held pending the Court's disposition of those cases.

1. The relevant statutory provisions are discussed in greater detail in the government's petition in *Atlantic Research*. Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). As amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, CERCLA provides the President, acting primarily through the Environmental Protection Agency (EPA), with several alternative means for cleaning up contaminated property. Most important for present purposes, Section 106(a) permits EPA to compel, by means of an administrative order or a request for judicial relief, other persons to undertake response actions, which EPA then monitors. See 42 U.S.C. 9606(a). Section 107(a) imposes liability for cleanup costs on four categories of "[c]overed persons"—typically known as potentially responsible parties (PRPs)—associated with the release or threatened release of hazardous substances. See 42 U.S.C. 9607(a). Unless they can invoke a statutory defense or exclusion, persons who qualify as PRPs are liable for, *inter alia*, "all costs of removal or

remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(A), and "any other necessary costs of response incurred by any other person consistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(B).

Before CERCLA was amended by SARA in 1986, lower courts disagreed as to whether one PRP could bring an action against another PRP for contribution or cost recovery, and, if so, the source of authority for such an action. See 06-562 Pet. at 4 (citing cases). With the enactment of SARA, however, Congress added Section 113(f), which provides PRPs with an express cause of action against other PRPs in two specific circumstances. First, Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." 42 U.S.C. 9613(f)(1). Second, Section 113(f)(3)(B) provides that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement." 42 U.S.C. 9613(f)(3)(B).

In *Cooper Industries*, *supra*, this Court held that, in order to pursue an action for contribution against another PRP under Section 113(f)(1), a PRP must itself have been sued under either Section 106 or Section 107(a). See 543 U.S. at 165-168. The Court expressly left open the principal question presented here —namely, whether a PRP could bring an action against another PRP for cost recovery under Section 107(a), see *id.* at 168-170—but it noted that "numerous decisions of

the Courts of Appeals" had held that an action for cost recovery under Section 107(a), on a theory of joint and several liability, was unavailable, *id.* at 169.

2. In 2001, respondent filed suit against petitioner in the United States District Court for the Southern District of New York. As is relevant here, respondent brought a claim under Section 113(f) of CERCLA, seeking to recover costs that respondent incurred (or expected to incur) in cleaning up contamination from manufactured gas plants at ten sites it owned in Westchester County, New York. Respondent contended that petitioner was a potentially responsible party because it (or its corporate predecessor) operated the gas plants between 1887 and 1904. Pet. App. 2a-3a, 25a-26a; First Amended Compl. ¶¶ 23-33, at 5-6.

The district court granted petitioner's motion for summary judgment. Pet. App. 30a-57a, 93a-95a. With regard to three of the sites (the Yonkers sites), which petitioner had leased from respondent, the district court held, in an oral ruling, that any liability petitioner had as a PRP was discharged by the terms of releases provided by respondent when petitioner terminated its leases. *Id.* at 95a. With regard to the remaining seven sites (the non-Yonkers sites), the district court subsequently held, in a written opinion, that respondent had presented insufficient evidence to create a disputed issue of fact as to whether petitioner (or its corporate predecessor) was an "operator" of the relevant plants for purposes of CERCLA. *Id.* at 44a-57a.

3. Respondent appealed, challenging both of those holdings. After briefing was complete, this Court held in *Cooper Industries* that, in order to pursue an action for contribution against another PRP under Section 113(f)(1), a PRP must itself be sued under Section 106

or Section 107(a). The court of appeals ordered the parties to submit supplemental briefs addressing the impact of *Cooper Industries*. In its supplemental brief, respondent conceded that *Cooper Industries* foreclosed it from bringing suit against petitioner for contribution under Section 113(f)(1), see Resp. C.A. Supp. Br. 1-4, but instead argued that, because it had entered into a "Voluntary Cleanup Agreement" with the New York State Department of Environmental Conservation (NYSDEC) with regard to the sites at issue, it could bring suit under Section 113(f)(3)(B), see *id.* at 4-6.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-23a, 24a-29a.

a. In its principal opinion, the court of appeals held that respondent had a cause of action against petitioner under CERCLA. Pet. App. 1a-23a. The court first rejected respondent's contention that it could bring suit under Section 113(f)(3)(B). *Id.* at 7a-10a. It reasoned that Section 113(f)(3)(B) "create[d] a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved." *Id.* at 7a. The court determined that the agreement with NYSDEC at most resolved respondent's liability for claims based on state law, not claims under CERCLA. *Id.* at 9a. The court acknowledged that the agreement "refer[red] to CERCLA"—specifically, by providing that NYSDEC "shall not take any enforcement action * * * under CERCLA * * * with respect to the Existing Contamination, to the extent that such contamination is being addressed by the Agreement." *Id.* at 9a-10a. But the court concluded that "this language cannot be construed to have resolved [respondent's CERCLA] liability." *Id.* at 10a. The court reasoned that the quoted language was applicable only as

long as respondent's cleanup efforts were still ongoing, *ibid.*, and that other language in the agreement left open the possibility that NYSDEC could take action against respondent under CERCLA, *ibid.*

The court of appeals, however, proceeded to hold *sua sponte* that respondent could bring suit under Section 107(a)—notwithstanding the fact that respondent had not asserted that it could sue under Section 107(a) and indeed had "appear[ed] willing to accept * * * that section 107(a) may never provide a right of action for a [PRP]." Pet. App. 13a. The court recognized that it, like other courts of appeals, had previously held that a PRP could not bring an action against another PRP for cost recovery under Section 107(a), but was instead limited to an action for contribution under Section 113(f). *Id.* at 12a-13a (citing *Bedford Affiliates* v. *Sills*, 156 F.3d 416 (2d Cir. 1998)). But the court distinguished its earlier decision on the factual grounds that (1) the plaintiff PRP "ha[d] incurred * * * expenditures under a consent order with a government agency" and (2) the plaintiff PRP "ha[d] been found partially liable under section 113(f)(1)." *Id.* at 19a.

The court of appeals ultimately concluded that "section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily." Pet. App. 16a-17a. According to the court, "determining whether [such] a party * * * may sue under section 107(a) is easily resolved based on that section's plain language." *Id.* at 14a. The court reasoned that, under Section 107(a), "[t]he only questions we must answer are whether [the PRP] is a 'person' and whether it has incurred 'costs of response.'" *Id.* at 15a. "Unlike

some other courts," the court continued, "we find no basis for reading into [Section 107(a)] a distinction between so-called 'innocent' parties and [PRPs]." *Ibid.* The court stated that "Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of section 107(a) require that the party seeking necessary costs of response be innocent of wrongdoing." *Ibid.* The court added that, in its view, a contrary reading of Section 107(a) would "impermissibly discourag[e] voluntary cleanup." *Id.* at 16a. According to the court, "[t]his would undercut one of CERCLA's main goals." *Ibid.*

b. In an accompanying unpublished order, the court of appeals then held that the district court had partially erred by granting petitioner's motion for summary judgment. Pet. App. 24a-29a. With regard to the non-Yonkers sites, the court of appeals agreed with the district court that respondent had "pointed to no evidence that would allow a reasonable jury to conclude that [petitioner] 'manage[d], direct[ed], or conduct[ed] operations specifically related to pollution'" at any of those sites. *Id.* at 28a (quoting *Bestfoods*, 524 U.S. at 66). With regard to the Yonkers sites, however, the court of appeals rejected the district court's conclusion that the relevant language in the releases provided by respondent to petitioner "was an explicit, unequivocal statement releasing *all* liability, or *contingent* liability, or *environmental* liability." *Id.* at 29a. For that reason, the court of appeals concluded, summary judgment was improper. *Ibid.*

DISCUSSION

In the wake of this Court's decision in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), there is a clear conflict among the courts of appeals on the principal question left open in that case: *i.e.*, whether a potentially responsible party can pursue an action against another PRP under Section 107(a). The government has filed a petition for a writ of certiorari in *United States* v. *Atlantic Research Corp.*, No. 06-562 (filed Oct. 24, 2006), and is filing, contemporaneously with this brief, a brief in response to the petition in *E.I. du Pont de Nemours and Co.* v. *United States*, No. 06-726 (filed Nov. 21, 2006); in both cases, the government has asked the Court to grant review to address that issue and resolve the circuit conflict. Although the court of appeals here incorrectly held that a PRP could bring suit against another PRP under Section 107(a), this case would constitute a less suitable vehicle than either *Atlantic Research* or *DuPont* for resolution of the circuit conflict. The petition for a writ of certiorari should therefore be held pending the Court's disposition of those cases.

1. As the government explained in its petition in *Atlantic Research* (at 9-14), the decision of the court of appeals in this case, while consistent with the decision of the Eighth Circuit in *Atlantic Research*, 459 F.3d 827 (2006), is in direct conflict with the decision of the Third Circuit in *DuPont*, 460 F.3d 515 (2006). In *Atlantic Research*, the Eighth Circuit, relying on the decision of the court of appeals in this case, held that Section 107(a) provides a PRP with an express right of cost recovery against another PRP. 459 F.3d at 834-835. Unlike the court of appeals in this case, the Eighth Circuit also

held, in the alternative, that "a right to contribution may be fairly implied from the text of [Section 107(a)]." *Id.* at 835. On the other hand, in *DuPont*, the Third Circuit held both that "a PRP seeking to offset its cleanup costs must invoke contribution under § 113" and that "no implied cause of action for contribution for PRPs—under either § 107 or the common law—survived the passage of § 113." 460 F.3d at 528-529. The decision of the court of appeals in this case not only conflicts with *DuPont*, but also is inconsistent with numerous pre-*Cooper Industries* decisions from other courts of appeals, which held that one PRP could not bring an action against another under Section 107(a) in various circumstances in which the plaintiff PRP could not avail itself of Section 113(f). See 06-562 Pet. at 5 n.2 (citing cases).

2. For the reasons discussed in greater detail in the *Atlantic Research* petition (at 15-23), the court of appeals in this case erred by holding that one PRP could bring an action against another under Section 107(a). The relevant language in that section provides that PRPs shall be liable for "any other necessary costs of response incurred *by any other person* consistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. 9607(a)(1)-(4)(B) (emphasis added). The most natural reading of the phrase "any *other* person" is that it excludes the persons who are the subject of the sentence: *i.e.*, PRPs.

Even assuming, moreover, that Section 107(a), standing on its own, could be construed to confer on a PRP a cause of action against another PRP for cost recovery, that provision must be read in light of Section 113(f), which provides a PRP with an express cause of action against another PRP in two enumerated circumstances. See CERCLA § 113(f)(1) and (3)(B), 42 U.S.C.

9613(f)(1) and (3)(B). The better view is that the subsequently enacted Section 113(f) specifies the exclusive circumstances in which one PRP may bring suit against another under CERCLA. Allowing a PRP to bring suit under Section 107(a) would render Section 113(f) effectively superfluous and undermine CERCLA's settlement scheme, because a PRP that has not yet been sued under Section 106 or Section 107(a) might refuse to settle with the government in order to preserve its right to sue under Section 107(a) (and thereby take advantage of the substantially more generous provisions applicable to such an action).

3. Although the court of appeals in this case incorrectly held that one PRP could bring an action against another under Section 107(a), this case would constitute a less suitable vehicle than either *Atlantic Research* or *DuPont* for resolution of the circuit conflict on that question. Before holding *sua sponte* that respondent was entitled to bring suit against petitioner under Section 107(a), the court of appeals held that respondent was *not* entitled to bring suit against petitioner under Section 113(f)(3)(B), on the ground that respondent had not settled its liability for CERCLA claims in its "Voluntary Cleanup Agreement" with the New York State Department of Environmental Conservation (and therefore had not "resolved its liability to * * * a State for some or all of a response action * * * in an administrative * * * settlement" for purposes of Section 113(f)(3)(B)). Pet. App. 7a-10a.

Although respondent has not argued in its brief in opposition that it could bring suit against petitioner under Section 113(f)(3)(B)—the sole argument that respondent actually advanced before the court of appeals—it may nevertheless argue, in the event that cer-

tiorari is granted, that the availability of an action under Section 113(f)(3)(B) effectively constitutes an alternative ground for affirmance of the court of appeals' decision. And even if respondent does not advance that argument in its brief on the merits, this Court may well conclude that the question whether respondent was entitled to bring suit against petitioner under Section 113(f)(3)(B) is a "predicate to an intelligent resolution" of the question on which there is a circuit conflict: *i.e.*, whether a PRP that does *not* satisfy the requirements for bringing an action for contribution under Section 113(f) may bring an action against another PRP under Section 107(a). See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 397 n.12 (1999); *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996); cf. *United States* v. *Resendiz-Ponce*, 127 S. Ct. 433 (2006) (ordering supplemental briefing on question whether the indictment in that case was constitutionally valid, after Court initially granted review to decide whether the unconstitutional omission of an element from the indictment was structural error).*

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* Both of the courts of appeals that have held that a PRP could sue another PRP under Section 107(a) have seemingly suggested that a Section 107(a) action would be unavailable where the plaintiff PRP was eligible to bring an action for contribution under Section 113(f). See *Atlantic Research*, 459 F.3d at 836-837 (stating that "liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality"); Pet. App. 14a (stating that "[e]ach of those sections, 107(a) and 113(f)(1), embodies a mechanism for cost recovery available to persons in different procedural circumstances"); but see *Schaefer* v. *Town of Victor*, 457 F.3d 188, 202 n.19 (2d Cir. 2006) (refusing to decide whether the plaintiff PRP could bring a claim under Section 113(f)(3)(B), and avail itself of the different limitations period applicable to such a claim, on the ground that the plaintiff PRP could bring a claim under Section 107(a)). Neither court offered any textual justification for that ap-

It is not clear, moreover, whether the court of appeals correctly held that respondent was not entitled to bring suit against petitioner under Section 113(f)(3)(B). In order to address that issue fully, the Court would potentially need to consider not only the case-specific question whether the agreement at issue actually settled respondent's liability for purposes of CERCLA, compare Pet. App. 9a-10a (determining that it did not), with Resp. C.A. Supp. Br. 4-6 (contending that it did), but also various legal questions concerning what constitutes a valid administrative settlement under Section 113(f)(3)(B). Compare, *e.g.*, *Seneca Meadows, Inc.* v. *ECI Liquidating, Inc.*, 427 F. Supp. 2d 279, 286-287 (W.D.N.Y. 2006) (holding that a settlement with a State would qualify as a Section 113(f)(3)(B) settlement where the settlement expressly resolved the PRP's liability for purposes of CERCLA, rejecting the defendant's contention that a "delegation" of CERCLA authority to the State was required), with *ASARCO, Inc.* v. *Union Pacific R.R.*, No. CV 04-2144-PHX-SRB, 2006 WL 173662, at *6 (D. Ariz. Jan. 24, 2006) (holding that a settlement with a State would not qualify as a Section 113(f)(3)(B) settlement where the settlement failed expressly to resolve the PRP's liability for claims under CERCLA, unless the State had EPA authorization and the settlement otherwise met the standards set forth in Section 122 of CERCLA, 42 U.S.C. 9622, for a settlement with EPA). Because those legal questions have not been addressed by any other court of appeals, they would not otherwise warrant this Court's review.

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parent view, however, nor did either court explain why Congress would have wanted to provide greater remedies to non-settling PRPs than to those who had discharged their liability to the United States or a State.

This case may also constitute a less suitable vehicle than *Atlantic Research* or *DuPont* on the ground that, unlike those cases, it does not present the subsidiary question of whether one PRP could bring an action against another on the theory that Section 107(a) contains an implied right to contribution. The court of appeals in this case held only that Section 107(a) *expressly* authorized one PRP to sue another. See, *e.g.*, Pet. App. 14a (stating that "determining whether [a PRP] * * * may sue under section 107(a) is easily resolved based on that section's plain language"). Although respondent could attempt to raise that argument as an alternative basis for affirmance, that argument was neither pressed in nor passed upon by the court of appeals, and accordingly has been waived. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7-8 (1993); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991). In *Atlantic Research* and *DuPont*, by contrast, that argument is squarely presented.

In any event, because this Court currently has before it two other cases in which it is clear that the principal question concerning the appropriate construction of Section 107(a) is cleanly presented (and was actually briefed before the respective courts of appeals), it is unnecessary for this Court to grant review in this case in lieu of, or in addition to, those cases. Instead, the better course would be to grant review in either or both of those cases and to hold the petition in this case pending their disposition.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petitions in *United States* v. *Atlantic Research Corp.*, No. 06-562, and *E.I. du Pont de Nemours & Co.* v. *United States*, No. 06-726, and then disposed of accordingly.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

KANNON K. SHANMUGAM
Assistant to the Solicitor General

RONALD M. SPRITZER
ELLEN J. DURKEE
Attorneys

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